TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. ~~289~~ 141.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

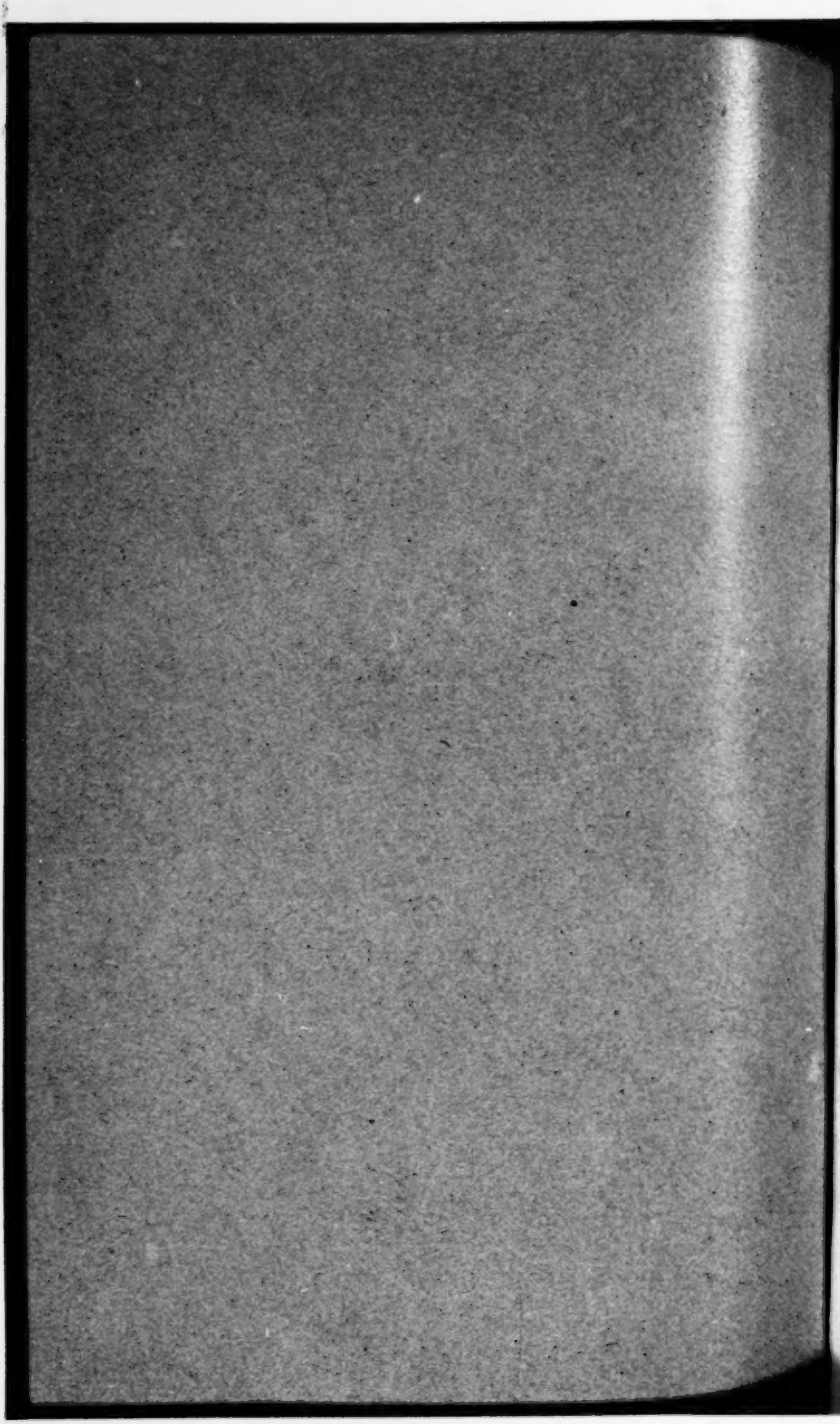
vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 21, 1900.

(17,881.)



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CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 22, 1900.

1 Proceedings of the circuit court of the United States for the district of Kentucky at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 19th, A. D. 1900.

Present: Hon. Walter Evans, sitting as circuit judge.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
C. C. MCCHORD, J. F. DEMPSEY, & JOHN C. WOOD, Defendants. } No. 6814.

Be it remembered that heretofore, to wit, on the 5th day of July, A. D. 1900, came the complainant in the above-entitled cause and filed its bill of complaint herein against the above-named defendants; which said bill of complaint is as follows:

2 In the Circuit Court of the United States, District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
C. C. MCCHORD, J. F. DEMPSEY, and JOHN C. WOOD.

To the judges of the circuit court of the United States for the district of Kentucky:

The Louisville & Nashville Railroad Company, a corporation organized under and pursuant to the laws of the State of Kentucky and having its principal place of business in the city of Louisville, in said State, brings this its bill against C. C. McChord, of Springfield, Washington county, Kentucky; J. F. Dempsey, of Madisonville, Hopkins county, Kentucky, and John C. Wood, of Mt. Sterling, Montgomery county, Kentucky, all of whom are citizens of the State of Kentucky; and thereupon your orator complains and says that the amount in controversy herein far exceeds the sum and value of ten thousand dollars, exclusive of interest and costs.

I. Your orator was incorporated and organized under an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to charter the Louisville and Nashville Railroad Company," approved March 5, 1850, whereby your orator was authorized to construct and operate a railrood from Louisville, Kentucky, to the Tennesse line in the direction of Nashville, Tennessee. Thereafter the said charter was amended by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend an act entitled An act to charter the Louisville & Nashville Railroad Company, approved March 5, 1850," approved March 20, 1851, and by its said charter as thus amended your orator was authorized to construct and operate a branch of said railroad to the Mississippi river
3 and any other branches your orator might desire. Thereafter the said charter was again amended by an act of the General

Assembly of the Commonwealth of Kentucky entitled "An act to amend the charter of the Louisville & Nashville Railroad Company," approved January 17, 1856, and by its said charter as thus amended your orator was authorized to purchase and hold any railroad constructed by any other company. The said charter was amended by divers other acts of the General Assembly of the Commonwealth of Kentucky not necessary to be here set out.

By virtue of said charter and amendments and upon the faith thereof your orator has constructed and now holds and operates the following railroads within the State of Kentucky:

Main stem, from Louisville to Tennessee State line in the direction of Nashville, about 139.88 miles in length; constructed about 1859.

Memphis line, from Memphis Junction, on said main stem, to the Tennessee State line at Guthrie, about 46.46 miles in length; constructed about 1859.

Knoxville division, from Lebanon Junction, on said main stem, to Tennessee State line at Jellico, about 171.17 miles in length; constructed at different times and completed at Jellico about 1882.

Cumberland Valley division, from Corbin, on said Knoxville division, to the Tennessee and Virginia State lines at Cumberland Gap, about 47.02 miles in length; constructed about 1890.

Shelby cut-off, from Christiansburg, on Lexington branch, hereinafter referred to, to Shelbyville, about 9 miles in length; constructed about 1895.

Any by virtue of said charter and amendments and upon the faith thereof your orator has acquired by purchase and now holds and operates the following railroads within the State of Kentucky:

4 Cincinnati division, from Louisville to Newport, about 113.85 miles in length; acquired about 1881.

Lexington branch, from Lagrange, on said Cincinnati division, to Lexington, a distance of about 66.02 miles; acquired at the same time as said Cincinnati division was acquired.

Kentucky Central division, about 248.30 miles in length; acquired September 26, 1891, and consisting of the following railroads:

A railroad from a point near Livingston, on said Knoxville division, to Covington, and connecting with said Cincinnati division at Milldale, near Covington, about 149.58 miles in length.

A branch railroad diverging at Paris from said railroad between Livingston and Covington and extending to Maysville, about 49.32 miles in length.

Another branch railroad likewise diverging at Paris from said railroad between Livingston and Covington and extending to Lexington, a distance of about 19 miles in length, and there connecting with said Lexington branch.

Another branch railroad extending from Rowland, on said Knoxville division, to a point near Richmond, on said railroad between Livingston and Covington, about 30.40 miles in length, which was originally constructed by your orator as a branch from its Knox-

ville division and then leased to another company until reacquired, as here stated.

Owensboro & Nashville division, from Owensboro to Adairville, about 83.46 miles in length, acquired about 1880, and connecting with said Memphis line at Russellville.

Shelby railroad, from Anchorage, on said Cincinnati division, to Shelbyville, about 19 miles in length; acquired about 1881.

Bardstown branch, from Bardstown Junction, on said main stem, to Bardstown, about 17 miles in length, acquired about 1860.

Springfield branch, from Bardstown to Springfield, about 20 miles in length, acquired about 1889.

Henderson division, consisting of a railroad from Guthrie, on said Memphis line, to Henderson, about 97.76 miles in length, and a branch therefrom, about 16.10 miles in length, from Madisonville, on said Henderson division, to Providence, which were acquired about 1879.

Greenburg branch, from Lebanon, on said Knoxville division, to Greenburg, about 30.90 miles in length, acquired about 1878 by a lease having several years yet to run.

All of said railroad- were constructed or acquired as stated, and all of them have been and are now held and operated by your orator by virtue of au- upon the faith of its said charter and amendments thereto.

The said railroads so described within the State of Kentucky are but parts of through lines of railroad operated by your orator. The said main stem extends from Louisville to Nashville, and your orator's lines of railroad extend from Nashville *auo*thwardly through Tennessee and Alabama, thence through Mississippi and into Louisiana to New Orleans, and into Florida to Pensacola and River Junction. The said Henderson division extends from Nashville, Tennessee, through Guthrie and Henderson, Kentucky, to Evansville, Indiana, where it connects with another line of your orator extending through Indiana and Illinois to St. Louis, Missouri. The said Cincinnati division extends from Newport to Cincinnati, Ohio, and the said Kentucky Central division is operated as a through line from Covington into Cincinnati, Ohio. The said Cumberland Valley division extends through a portion of Tennessee and into Virginia to Big Stone Gap and Norton. The said Memphis line extends from Guthrie southwestwardly to Memphis, Tennessee, and at all terminal points of your orator's railroad and at many other points thereon, both in Kentucky and out of Kentucky, it makes connections with other railroads whereby there can be and is carried on through bills of lading freight between points in Kentucky and all parts of the United States. Your orator's system of railroads, above referred to, of which the said railroads in the State of Kentucky above described are an integral part, is about 3,000 miles in extent and traverses or reaches the States of Missouri, Illinois, Indiana, Ohio, Kentucky, Tennessee, Virginia, Alabama, Mississippi, Louisiana, and Florida, and said system is operated as a whole. Your orator carries a very large traffic over that part of its

lines in the State of Kentucky, both passenger and freight, and both State and interstate, and about 80 per cent. of such traffic passing over its lines in the State of Kentucky is interstate traffic in the strictest sense, and much of the remainder is virtually interstate traffic, the rates upon which have a direct and vital connection with the rates upon interstate traffic and a direct and far-reaching influence upon commerce among the States.

II. By its said charter your orator was authorized to charge for the transportation of persons, merchandise, and property of any kind whatever any sum not exceeding the following rates, to wit: For the transportation not over 20 miles or under 50 miles of all goods, merchandise, or property, not exceeding 3½ mills for each mile per hundred pounds; for all other transportation of freight and property, not exceeding 4 miles for each mile per hundred pounds; for transporting single packages any distance weigh-
7 ing not less than 100 pounds, 25 cents; for transporting live stock, poultry, furniture, feathers, wool, and rags, and other like light bulky articles, weighing not more than 65 pounds to the cubic foot, not exceeding 15 per cent. above the rates allowed to be charged for heavy merchandise. Gold, silver, bullion, money of all kinds, and mails were excepted from the rates established in said charter, and the board of directors was authorized to contract especially therefor. For the transportation of passengers your orator was authorized to charge not exceeding 4 cents per mile for each passenger with his baggage weighing not more than 40 pounds. Said maximum rates hereinabove set out and which by its charter your orator was authorized to charge were set out in part in the 18th section of said charter of March 5, 1850, and in so far as they are not set out in said 18th section of said charter your orator was by said 18th section of said charter authorized to charge the same maximum rates as were authorized to be charged on the railway from Lexington to Frankfort, and the maximum rates authorized to be charged on said railway from Lexington to Frankfort on March 5, 1850, were set out in the 20th section of the act of the General Assembly of the Commonwealth of Kentucky approved February 28, 1848, and entitled "An act to incorporate the Lexington & Frankfort Railroad Company," and the maximum rates provided in the 20th section of said act of February 28, 1848, were in full force and effect upon said railway from Lexington to Frankfort on March 5, 1850.

Your orator says that by reason of the premises there was and is a valid and subsisting contract between the Commonwealth of Ken-
tucky and your orator, whereby your orator is authorized to
8 charge within the State of Kentucky not exceeding the maximum rates hereinabove set out upon the railroads operated by it under its said charter and amendments within the State of Kentucky, and that said railroads were constructed and acquired by your orator upon the faith of said contract.

9 III. Defendants herein are holding and exercising the offices of railroad commissioners of the State of Kentucky, having been duly elected thereto and qualified therefor, and as such

constitute the railroad commission of said State, and as such claim and unless restrained by the orders of this court will exercise the right to fix rates for the transportation of passengers and property over the various lines of your orator's railroad by virtue of an alleged act of the General Assembly of the Commonwealth of Kentucky, which it is claimed became a law on the — day of March, 1900, and took effect on the 12th day of June, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violations of its provisions." The said act consists of five sections in the following words, to wit:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission, to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent, or employee thereof, charge, collect or receive a greater or higher rate, toll, or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and

for third and succeeding convictions in any sum, not less than two thousand dollars nor more than five thousand dollars.

SEC. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending and the circuit court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

SEC. 3. Prosecutions under this act shall be by indictment.

SEC. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

SEC. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

11 By said act said railroad commission is authorized and required, when complaint is made or when it receives information or has reason to believe that any railroad company or corporation is charging, collecting, or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, to hear and determine the matter as speedily as possible, and before doing so to mail not less than ten days beforehand a notice to any officer, agent, or employé of said company or corporation—for example, to a brakeman or section hand—stating the time and place of the hearing and the nature of the matter to be investigated.

Said railroad commission is further authorized and required by said act, if upon such investigation made upon such notice it shall determine that said company or corporation is or has been guilty of extortion in the particulars charged, to make and fix, without any notice and without any investigation, what it shall deem to be a just and reasonable rate, toll, or compensation which said company or corporation may thereafter charge, and said rate, toll, or compensation so fixed shall be in full force and effect at the expiration of ten days after the said commission shall have mailed a copy of the order fixing the same to any officer, agent, or employé of the said company or corporation affected thereby—for example, as above stated, such notice may be mailed to a brakeman or section hand—and at all times thereafter said commission may, at any time and without any notice and without any investigation, modify or change the rates thus fixed by it; and if said company or corporation or any of its officers, agents, or employés shall thereafter charge, collect, or receive a greater rate than that made and fixed by said commission, as above stated, said company or corporation and said officers, agents, and employés are each by said act made guilty of extortion and, upon conviction, are each to be fined for the first offense not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction in any sum not less than one thou-

sand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars.

12 Thus, under said act, said railroad commission is authorized to fix the rates of your orator and all other railroad companies or corporations without any notice and without any investigation from or by it. The rates so fixed are to go into full force and effect simply by the lapse of ten days from the date of the mailing of the copy of the order fixing the same to any officer, agent, or employé of the railroad company or corporation, and unless the railroad company or corporation affected thereby straightway complies with said rate, although such rate may be a palpable invasion of such company's or corporation's constitutional rights, such corporation will be subject to the excessive fines fixed in said act with respect to each shipment passing over its road to which said commission desires said rates so fixed to apply, and every officer, agent, or employé of said company or corporation either charging, collecting, or receiving the rate fixed and charged by said company or corporation for each of such shipments in question, although the said corporation may have full right and power under the Constitution of the United States to charge such rate, will likewise be subjected to said excessive fines.

IV. All of your orator's rates charged, collected, or received within the State of Kentucky are just and reasonable and have not been sufficient for many years to give it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skillful manner. All of its said rates are very much less than the rates which your orator has the right to charge by its contract with the Commonwealth of Kentucky hereinabove set out. In addition to complying with this contract with the State of Kentucky in the matter of rates fixed and charged, and in addition to fixing and charging said rates subject to and in conformity with the requirements of law applicable to all common carriers that their rates shall be just and reasonable, your orator is subject to and complies with all the requirements of the laws

13 of the State of Kentucky prohibiting unjust discrimination between individuals or localities in the matters of rates, which laws do not apply to all common carriers, but are unreasonably restricted, so as to apply merely to corporations which operate railroads, and, in addition to complying with its agreement with the State of Kentucky and with all the provisions of the law, your orator is forced to and does recognize the requirements of competition which constantly tend to reduce rates and which affect not merely rates to or from points known as competitive points, but in a greater or less degree all rates between all points, so as to prevent any rates becoming or remaining unreasonably high; yet notwithstanding the premises it was and is the purpose of the said act last above referred to to reduce the rates of your orator and other railroad companies in the State of Kentucky, and your orator believes and avers that the said act will have said effect and no other. Your orator

submits, therefore, that the necessary effect of said act will be to impair the obligation of said contract between your orator and the Commonwealth of Kentucky, to the great and irreparable injury of your orator, and the said act is therefore, as to your orator, null and void because in contravention of paragraph 1 of section 10 of article 1 of the Constitution of the United States, but your orator believes and avers that unless restrained by the order of this court the said defendants will proceed under said act, though the same is null and void, to reduce the said rates, and thereby violate the said contract rights, to your orator's irreparable injury, and your orator and its agents, servants, and employés will on that account, as will hereinafter be more fully set out, be subjected to a multiplicity of prosecutions and actions.

14 V. It is the duty of said railroad commission, composed, as aforesaid, of the defendants herein, to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State. To this end they are authorized and required to inquire into the management of affairs of railroad companies; to inspect and examine their tracks, bridges, tunnels, and other structures; to supervise facilities at stations, and in many other ways to exercise administrative functions with respect to the railroads of said State. The constitution of said State divides the powers of its government into three distinct departments, each to be confined to a separate body of magistracy—those which are legislative to one, those which are executive to another, and those which are judicial to another—and declares that no person or collection of persons being of one of those departments shall exercise any power properly belonging to either of the others, except in the instances expressly directed and permitted in said constitution. By said constitution the judicial power of said State is vested in the senate, when sitting as a court of impeachment, and one supreme court, to be styled the court of appeals, and the courts established by said constitution, to wit, circuit courts, quarterly courts, county courts, justices' courts, police courts, and fiscal courts. The said railroad commission is not established as a court by said constitution and is not expressly directed or permitted by said constitution to exercise any judicial powers; on the contrary, its powers are essentially and purely of an administrative character, and it essentially belongs to the executive department of the State government. The laws of said State not only fail to confer upon it judicial functions or powers, but prohibit the conferring of any such powers upon it, and by reason of the administrative functions with respect to the conduct and regulation of railroads which said commission is required and authorized to perform it is rendered essentially unfit to exercise judicial functions.

15 VI. While all other common carriers, whether operating railroads or not, are subject only to the requirement that their rates are just and reasonable, and in case of controversy are entitled to have the judgment of the courts upon that question, the said act hereinbefore referred to singles out railroad corporations and denies them the equal protection of the laws

applying to all other common carriers, and deprives said railroad corporations of any opportunity to have a judicial determination of the reasonableness of their rates when the same are called in question, and substitutes therefor the determination of said railroad commission, which is not and cannot be a court and which does not afford and cannot afford a judicial hearing or determination of questions brought before it; and whereas all other common carriers in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or consequence attaches to such judicial determination, yet railroad corporations are to be subjected, in the absence of any judicial determination as to whether their rates are reasonable or otherwise, and simply upon the determination of said non-judicial tribunal, the railroad commission, that such rates are unreasonable, to the penalty of having the power to make their rates taken out of their hands and vested exclusively in said railroad commission, which commission is then without any hearing, judicial or otherwise, to fix such rates as it may choose, and is thereafter without any notice and without any hearing, judicial or otherwise, to have the right at its pleasure to modify the rates so fixed by it, and if said railroad corporations fail to charge the rates thus fixed for them by this unjust and unconstitutional procedure they will be subjected for every shipment passing over their lines to which said railroad commission may desire said rates so fixed by it to apply to the prosecutions, fines, and penalties imposed in said act.

16 VII. Your orator submits that under the Constitution of the United States, and independently of the aforesaid contract with the State of Kentucky, it is entitled to charge reasonable rates for the use of its property, and that it cannot be compelled to charge rates fixed by the railroad commission of Kentucky in the absence of a judicial investigation and determination that the rates so fixed are just and reasonable; that the said act makes no provision for any investigation or determination even by the railroad commission that the rates fixed by it are just and reasonable, and the said commission may fix such rates without any notice to the railroad corporations to which said act applies as to what said commission proposes to do and without any investigation of the questions involved, and may thereafter change or modify said rates without any notize or investigation; but that even if said commission should choose to give notice and investigate such questions, such investigation and resulting determination would not satisfy your orator's constitutional rights to a judicial determination, because said commission is not a court, nor is it clothed with judicial functions, but, on the contrary, it is an administrative tribunal, which, under the law, cannot exercise judicial functions, and which, by reason of the functions it does exercise, is in its nature incapable of affording the judicial investigation to which your orator is entitled, and by said act your orator is denied the privilege and right to have it judicially determined by a court of competent juris-

diction whether the rates fixed and charged by it are just and reasonable, and whether the rates fixed by said commission amount to a confiscation and spoilation of its property. If, therefore, defendants be permitted to proceed under said act, your orator will be compelled to charge the rates fixed by them without any opportunity for a judicial investigation and determination as to their reasonableness, and it will thus be deprived of the lawful use of its property and in substance and effect of its property itself without due process of law, and will also be denied the equal protection of the laws, in violation of section 1 of article 14 of the amendments to the Constitution of the United States.

17 VIII. Your orator further says that the said act of March, 1900, relates to all freight and passenger rates charged, collected, or received by railroad companies in the Commonwealth of Kentucky, and is not restricted to rates actually charged, collected, and received, within the Commonwealth of Kentucky, for transportation commencing and ending within the said State, and therefore by its terms is an express and direct interference with and regulation of commerce among the States, and therefore the said act is in conflict with paragraph 3 of section 8 of article 1 of the Constitution of the United States, which gives to the Congress of the United States exclusive power to regulate commerce among the States, and which power has been exercised by Congress by an act of February 4, 1887, entitled "An act to regulate commerce among the States," and by the acts amendatory thereof, and that said act of March, 1900, is therefore null and void.

IX. Defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroads in the State of Kentucky for the purpose of considering whether or not they shall be altered and reduced in accordance with the terms of said act, and are giving it out in speeches and interviews that they intend to proceed at once under said act, and, unless restrained by the order of this court, defendants will proceed at once to hear and determine complaints under said act, although the same is in contravention of the Constitution of the United States in all the particulars hereinabove set out, and is therefore null and void, and will proceed thereupon to reduce your orator's rates to such as they think your orator should charge, and will thereafter at pleasure modify and still further reduce the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the State of Kentucky for failing to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right

18 to ship at said rates so unconstitutionally fixed and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offense and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted, and heavily fined, to the

great demoralization of the public service which your orator is bound to render, and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator's contract rights will be impaired, it will be deprived of its property without due process of law, denied the equal protection of the law, and subjected to great, irreparable wrong and injury and to a vast multiplicity of prosecutions and actions in the courts of said State.

Forasmuch as your orator can have no adequate relief except in this court, and to the end that the defendant- may, if they can, show why your orator shall not have the relief herein prayed, and that they answer this bill according to the course and practice of the court, but not under oath, the answer of each of them under oath being hereby expressly waived, your orator prays that said act of March, 1900, be decreed and be declared to be in contravention of the Constitution of the United States, and therefore null and void, and that until the further order of the court said defendants be enjoined from taking any action whatever against or in relation to complainant under said act; that said injunction may be perpetual upon final hearing, and as irreparable injury to your orator may ensue if defendants should take any action against or in relation to your orator under said act before the motion for a preliminary injunction can be heard, your orator prays that an order be granted restraining defendants from doing the acts herein sought to be enjoined, and your orator prays for such other and further relief as in equity it may be entitled to, and further prays that your honors also grant unto your orator a writ of subpœna of the United States of America, directed to the said C. C. McChord,
19 J. F. Dempsey, and John C. Wood commanding them on a day certain to appear and answer this bill and to abide and perform such order and decree as to your honors shall seem meet and equitable; and your orator will ever pray, etc.

HELM, BRUCE & HELM,
WALKER D. HINES,
Solicitors for Complainant.

THE UNITED STATES OF AMERICA, *District of Kentucky*, } *ss:*

M. H. Smith, being duly sworn, states that he is president of The Louisville & Nashville Railroad Company, the complainant above named; that he has read the foregoing bill and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

M. H. SMITH.

Subscribed and sworn to before me by M. H. Smith, this 5th day of July, 1900. My commission expires January 8th, 1902.

G. W. B. OLMSTEAD,
[SEAL.] *Notary Public, Jefferson Co., Ky.*

20 Upon which bill the following process issued:

The President of the United States of America to Charles C. McChord, James F. Dempsey, and John C. Wood, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in August next, to answer a bill in equity exhibited against you in our said court by Louisville & Nashville Railroad Company, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of our said circuit court, hereto affixed at the clerk's office of said court, in Louisville, this 5 day of July, A. D. 1900, and in the 125 year of our Independence.

Attest:

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 6th day of August next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

Upon which the marshal made the following returns:

Came to hand July the 6th, 1900.

A. D. JAMES, *U. S. Marshal,*
By LAURENCE YONTS,
Deputy U. S. Marshal for the District of Kentucky.

Executed on James F. Dempsey by delivering to him a copy hereof this July the 9th, 1900.

A. D. JAMES,
U. S. Marshal,
By LAURENCE YONTS,
Deputy U. S. Marshal for the District of Kentucky.

21 Executed the within on Charles C. McChord, at his residence, in Springfield, Ky., by delivering to him a true copy of this spa. in ch'y this July 23, 1900.

A. D. JAMES, *U. S. Marshal,*
By G. C. THOMPSON, *D. U. S. M.*

Received the within spa. in ch'y, at Frankfort, Kentucky, this 12 day of July, A. D. 1900.

Executed this 13th day of July, 1900, at Mt. Sterling, Kentucky,

by delivering a true copy of the within spa. in ch'y to John C. Wood.

A. D. JAMES,
U. S. Marshal,
By C. McCARTY, *D. M.*

22 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JULY 9TH, 1900.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
C. C. McCHORD, &c., Defendants.

This day came the complainant, by Helm, Bruce & Helm and Walker D. Hines, and produced herein notices, duly served upon the defendants, that the complainant would upon this day enter the motion for an interlocutory injunction in the terms of the prayer of its bill of complaint herein.

And thereupon came the defendants, by the Honorable Robert J. Breckinridge, attorney general of Kentucky, but not waiving any objections to the jurisdiction of the court or other objections to the maintenance or conduct of this suit, but expressly reserving the same; and the complainant thereupon moved the court to grant to it an interlocutory injunction in accordance with the terms of the prayer of its bill of complaint herein; to which the defendants objected.

And thereupon, by consent, the said motion is assigned to the 13th day of July, 1900, at ten o'clock a. m., for hearing, it being agreed and so ordered that in the meantime the *status quo* shall be preserved and no effort made by the defendants to enforce the terms of the act of the legislature set out in the bill of complaint, and commonly known as the McChord law, against this complainant.

The notice above referred to is as follows:

23 Circuit Court of the United States in and for the District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. McCHORD, JAMES DEMPSEY, JOHN C. WOOD, Defendants.
} Notice.

GENTLEMEN: You are hereby notified that on Monday, July 9, 1900, at or about the hour of ten a. m., the complainant in the above-entitled cause will, before the United States circuit court, sitting at Louisville, Kentucky, move the court for a temporary injunction in accordance with the prayer of its bill of complaint herein this day filed, and a copy of which bill of complaint accom-

panies this notice and is to be served upon Charles C. McChord, the chairman of the railroad commission of Kentucky.

July 5th, 1900.

Respectfully,

HELM, BRUCE & HELM,
WALKER D. HINES,
For Compl't.

To Hon. Charles C. McChord, Hon. James F. Dempsey, Hon. John C. Wood.

Filed July 9th, 1900.

THOS. SPEED, *Clerk.*

24 In the Circuit Court of the United States, District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainants,
v.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

E. C. Turner, being duly sworn, states that he served the foregoing notice and the bill of complaint therein referred to upon the therein-named Charles C. McChord on the 5th day of July, 1900, by delivering to the said Charles C. McChord, at Springfield, Ky., at 7.45 p. m., on said date, a copy of the said notice and a copy of the said bill of complaint, and that he served the said notice upon the therein-named James F. Dempsey on July 6, 1900, by delivering to him a copy of the said notice at Louisville, Ky., at 9.50 a. m. on said date.

And Thos. B. Harrison, Jr., being duly sworn, states that he served the foregoing notice upon the therein-named John C. Wood on July 5th, 1900, by delivering a copy of said notice to said John C. Wood, at Mt. Sterling, Ky., at 9.45 p. m. on said date.

E. C. TURNER.
THOS. B. HARRISON, JR.

Subscribed and sworn to before me by E. C. Turner and Thos. B. Harrison, Jr., respectively, this 6th day of July, 1900. My commission expires January 8, 1903.

G. W. B. OLMSTEAD,
Notary Public, Jefferson Co., Ky.

25 And on the 13th day of July, 1900, came the complainant, by Helm, Bruce & Helm and Walker D. Hines, for its counsel. Came also the defendants, by Louis McQuown and D. W. Baird, their counsel, and filed their demurrer to the bill of complaint herein.

The complainant's motion heretofore entered herein for an interlocutory injunction coming on to be heard and having been argued by counsel, and the court, not being advised, takes time.

The demurrer above referred to is as follows:

26 Circuit Court of the United States in and for the District of Kentucky.

LOUISVILLE & NASHVILLE RAILroad Company, Complain-t, *vs.* CHARLES C. McCHORD, JAMES F. Dempsey, and John Wood, Defendants.	The Demurrer of Charles C. McChord, James F. Dempsey, and John C. Wood.

These defendants, Charles C. McChord, James F. Dempsey, and John C. Wood, jointly and severally, not confessing all nor any of the matters in the bill of complaint contained to be true as therein set forth, do demur to said bill for that the same does not state such a case nor contain any matter of equity entitling the complainant to any relief against these defendants or any of them; that this court is without jurisdiction to proceed, hear, or determine the matters set forth in said bill; that the complainant has a full and adequate remedy at law.

Wherefore they pray the judgment of the court whether they shall be compelled to further answer said bill, and further pray to be dismissed with their costs.

ROB'T J. BRECKINRIDGE, JR.
D. W. *DAIRD.*
AARON KOHN.
ZACK PHELPS.
LOUIS McQUOWN.

I, Louis McQuown, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is, in my opinion, well founded in law.

LOUIS McQUOWN.

UNITED STATES OF AMERICA, }
District of Kentucky. }

I, Charles C. McChord, one of the defendants in the above cause, being duly sworn, do says that the foregoing demurrer to the bill of complaint is not interposed for purposes of delay.

CHAS. C. McCHORD.

Subscribed and sworn to before me by Charles C. McChord this 13th day of July, 1900.

My com. expires Jan. 13, 1904.

DAVID W. BAIRD,
N. P., J. C., Ky.

27 And on the 16th day of July, 1900, came again the complainant, The Louisville & Nashville Railroad Company, by Walker D. Hines and Helm Bruce, counsel, and came also the defendants herein, by Louis McQuown and D. W. Baird, counsel, and the court, being advised of the motion heretofore entered herein to grant to the complainant an interlocutory injunction in accordance with the terms of the prayer of the bill of complaint

herein, delivered an opinion in writing, which is filed and ordered to be made a part of the record, and in consideration thereof it is adjudged, ordered, and decreed as follows: That the defendants, C. C. McChord, J. F. Dempsey, and John C. Wood, be, and they are hereby, enjoined and restrained until the further order of the court herein from entertaining any complaint against complainant, or giving any notice of or conducting any hearing against complainant, or fixing any rate, toll, or compensation which the complainant may charge, collect, or receive, or from entering any such rate, toll, or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent, or employé of the complainant, or from taking any action whatever against or in relation to complainant under said act of March 10th, 1900, entitled "An act to prevent railroad companies or corporations ow-ing and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions," approved on the 10th day of March, 1900.

This order shall take effect upon the complainant's execution of a bond, with good security, to be approved by the clerk, in the penal sum of $1,000, to indemnify the defendants herein against all loss that may result from the issue of the injunction hereby ordered.

The opinion above referred to is as follows:

28 *Opinion.*

United States Circuit Court, District of Kentucky.

L. & N. R. R. Co.
vs.
C. C. McChord et al.

L., H. & St. L. R'y
vs.
The Same.

C. & O. R'y Co.
vs.
The Same.

Southern R'y Co.
vs.
The Same.

These actions have for a common object the prevention of the threatened enforcement of an act of the General Assembly of this State which became a law on the 10th day of March, 1900, and if constitutional became effective ninety days thereafter. Including its title, *and* act is as follows:

"An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. When complaint shall be made to the railroad commission ac-using any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received,
29 it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect, or receive for like services thereafter rendered. The rate, tolls or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent, or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employé thereof, charge, col-ect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars, nor more than two thousand dollars, and for the third and succeeding convictions, in any sum not less than two thousand dollars, nor more than five thousand dollars.

SEC. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or

corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or em-
30 ployé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

SEC. 3. Prosecutions under this act shall be by indictment.

SEC. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

SEC. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

The complainants severally seek the order of this court enjoining and restraining the defendants, who compose the railroad commission of the State, from carrying into effect any of the provisions of the act upon the ground that it violates the Constitution of the United States, first, in authorizing the commission to fix rates at certain instances upon interstate commerce; second, in authorizing the commission to deprive them of their property without due process of law; third in authorizing the commission to take from them the equal protection of the law; fourth, in authorizing the commission to take their property for public use without just compensation; fifth, in authorizing all of these things to be done by a body of executive officers who are not a court and who are without judicial powers, and, sixth, as to the Louisville & Nashville Railroad Co., by authorizing the defendants to fix rates different from those established by the unrepealable charter provisions of that company, thereby impairing the obligations of its contract with the State of Kentucky.

When the act is closely analyzed it is found to provide, first, that either when complaint shall be made to the railroad commission accusing any railroad or corporation of charging, collecting, or receiving extortionate freight or passenger rates over its line of railroad in this State or when that commission shall receive information or have reason to believe that such rates are being charged, collected, or received it shall be, second, its duty to "hear and de-
31 termine" the matter as speedily as possible; third, the company complained of shall be given not less than ten days' notice by letter mailed to an officer or employé of such company, stating the nature of the complant or matter to be investigated and the time and place of hearing it; fourth, the commission shall hear such statements, arguments, or evidence offered by the parties as the commission may deem relevant and may take the depositions of witnesses; fifth, should the commission determine that the company is or has been guilty of extortion, it shall fix a just and reasonable rate of toll or compensation which said company may charge, collect, or receive for like services thereafter rendered; sixth, the rate so fixed shall be entered in its order book and a copy mailed to an officer, agent, or employé of the railroad company affected

thereby, and after ten days thereafter shall be in full force until changed by the commission on the record; seventh, should any such railroad, its officer, agent, or employé, thereafter charge, collect, or receive a greater rate of compensation for like services than those thus fixed for it by the commission, such railroad, its agent or employé, shall be guilty of extortion, and shall be fined as provided in the act, and, eighth, of the offense of extortion as thus defined the various circuit courts of the State shall have jurisdiction by indictment.

The Supreme Court of the United States in many cases has announced certain fundamental principles which have a more or less direct bearing upon the questions involved in these cases. In Chicago, &c., R'y Co. *vs.* Minnesota, 134 U. S., at page 458, the court used this language: "The question of the reasonableness of
32 a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and thus in substance and effect of the property itself without due process of law and in violation of the Constitution of the United States, and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In Reagan *vs.* Farmers' Loan and Trust Co., 154 U. S., at page 399, Mr. Justice Brewer, speaking for the court, said: "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which in the form of a regulation of rates operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws, which by the fourteenth amendment no State can deny to the individual, forbids
33 legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another or of the public. This, as has been often observed, is a government of law and not a government of men, and it must never be forgotten that under such a government, with its constitutional limits and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the

unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

In St. Louis & San Francisco R'y Co. *vs.* Gill, 156 U. S., —, it was held that when a State legislature establishes a tariff of railroad rates so unreasonable as to practically destroy the value of the property of the company engaged in the carrying business courts of the United States may treat it as a judicial question and hold such legislation to be in conflict with the Constitution of the United States as depriving the company of its property without due process of law and as depriving it of the equal protection of the law.

In the case of Covington, &c., Turnpike Co. *vs.* Sandford, 164 U. S., 578, it was held that the courts have the power to inquire whether a body of rates prescribed by a legislature is unjust and unreasonable and such as to work a practical destruction of rights of property and, if found so to be, to restrain its operation, because such legislation is not due process of law.

In Smythe *vs.* Ames, 169 U. S., 466, after an elaborate review of all the authorities, the court held, as it had frequently done before, that a railroad corporation is a person within the meaning of the fourteenth amendment, declaring that no State shall deprive any person of property without due process of law nor deny
34 to any person within its jurisdiction the equal protection of the law. In that case the court also held that a State enactment or regulations made under the authority of a State enactment establishing rates for the transportation of persons or property by a railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the Constitution of the United States. The court held, further, that, while rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably law as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority that the matter may not become the subject of judicial inquiry. The court also held, further, that the idea that any legislature, State or Federal, can conclusively determine for the people *of* for the courts that what it enacts in the form of law or what it authorizes its agents to do is consistent with the fundamental law is in opposition to the theory of all our institutions, as the duty rests upon all courts, State or Federal, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation, and Mr. Justice Harlan, in delivering the opinion of the court in that case, at page 528, said: "The perpetuity of our institutions and the liberty which is enjoyed under them depends in no small degree upon the power given the judiciary to declare null and void

all legislation that is clearly repugnant to the supreme law
35 of the land."

The courts of the United States have not hesitated, and in order to preserve to all persons, corporations, and individuals alike the guarantees of the Constitution against invalid legislation, whether State or national, should not hesitate, to enforce the supreme law of the land. If in these cases the legislature or the railroad commission had established any rate by or through the act complained of the reasonableness and justness of that rate would be the legitimate subject of judicial inquiry under the decisions referred to, but no rates have in fact been fixed and none are authorized to be fixed except pursuant to the express provisions of the act itself nor until the commission has after trial "determined" that the railroad company had been "guilty of extortion." It will be observed that there is no general power delegated to the commission to fix rates, nor does the statute creating the commission give it any such right. Its sole authority in the premises is stated in the act above set forth, and must be based upon its conviction of the railroad extortion. It cannot move until what we may call this jurisdictional fact has been ascertained to exist, and then having proceeded to determine that the railroad has been "guilty of extortion," although it has been furnished with no unmistakable statutory standard as to what is to be held to be extortion, it lowers the rate of that road for that particular service. Its own opinion, its own judgment, is the sole guide upon both questions. If the law only conferred on the commission power to fix a schedule of rates for all railroads in the State generally it would be the duty of the court to await its action in that regard and then permit those rates, if called in question, to
36 stand or fall, as they might, in the court's judgment, be just and reasonable, or the reverse.

It might be conceded that in case a railroad commission was given general power to establish a schedule of rates a failure on the part of a carrier to conform to those rates when established might be made punishable (Reagan *vs.* Farmers' Loan and Trust Co., 154 U. S., 362). But this does not yet reach the case before us. Here the power given is to be exercised only where the commission has "determined" that the railroad company had been "guilty of extortion" in a given instance or instances complained of, and then apparently only by way of punishment therefor or as an occasion for laying a foundation for other punishment, although the legislature has established no definite test (unless in the Louisville & Nashville R. R. case) of what is an extortionate rate and no positive guidance in the case of any of the complainants, unless it be that company whose charges are fixed at the maximum rate stated in its bill. It is frankly and altogether properly conceded upon all hands that the railroad commission is not constitutionally a judicial body and cannot under the constitution or laws of Kentucky rightly exercise judicial functions. Section 27 of the present constitution of the State provides that the powers of the Government shall be divided into three separate departments, and each of them be confined to a separate body of magistracy, namely, the

legislative, the executive, and the judicial, and section 28 provides that no person or collection of persons being of one of those departments shall exercise any power properly belonging to either of the others. Under section 109 to 144, inclusive, the judicial department of the State government is established and no judicial tribunals except those named therein can lawfully be estab-
37 lished in Kentucky. A railroad commission is not one of these.

The Supreme Court of the United States in many cases holds that a railroad commission is a mere administrative body and part only of the executive department of the Government.

Our analysis of the act in question, however, has clearly shown that the whole apparent purpose of the act was to give the commission the judicial power or at least the quasi-judicial power to "hear and determine" whether a railroad has been "guilty of extortion," and as a result to lower the freight rate of that railroad for similar services. The commission could act only upon complaint made to it, unless in the presumably rare instances when information should otherwise come to it. The complaint must show what is loosely called a charging of an "extortionate" freight rate. The company complained of must be notified. This, it is true, must be given, not personally, but only through the mails, and the notice may be sent to a mere employé, who may be the most insignificant laborer and one who cares nothing for the interests of his employer. But there must be, at least, this sort of notice through the mails. At the hearing of the complaint, evidence which the commission may adjudge to be "relevant" may be heard. Arguments may be submitted and depositions may be taken and read. When the commission has "determined" that the company is "guilty of extortion" it shall then fix the rate thereafter to be charged in similar cases by that company only and not by carriers generally. This shall be entered upon the records of the commission.

Afterwards if the company thus found "guilty of extortion" shall in a like case charge or collect a rate greater than the one thus fixed or if any of its employés shall do so, it shall be guilty of the crime of extortion.

38 These matters all bear the marks of a judicial proceeding, and the fixing of a lower rate has all the appearances of inflicting that much punishment upon the party found "guilty of extortion" by this non-judicial body; but the act goes further and provides that if after the rate is thus fixed, that if after this possible punishment is thus inflicted, that company charges a higher rate for similar services, however reasonable it in fact might be in the judgment of the court, the real judicial tribunals of the State are then given the power to punish it or its employés therefor, though the power is apparently withheld from those courts of judicially inquiring whether the rate thus fixed under these circumstances by the commission was just or reasonable, or whether in the case of the Louisville & Nashville Company they exceeded the rates it is expressly authorized to charge by its charter.

It will be seen, too, that the act might literally apply equally and indiscriminately to domestic and to interstate traffic alike, although as to the latter it cannot be pretended that the legislature could give the commission any power whatever. That the commission cannot upon any complaint or information lawfully base any action upon charges of freight rates upon interstate commerce is too clear for argument, but as that may be true and the commission still have power to fix rates upon local freight, the question yet remains as to the respective rights of the complainants and the commission in respect to domestic commerce.

In a line of cases like Baldwin *vs.* Franks, 120 U. S., 686, the rule is established that where the language of a statute is so broad as to cover cases which are beyond the constitutional limits of
39 legislative power, as well as *those* which are not, the courts will not attempt to separate them, but will hold the entire statute to be void, and it is insisted that this principle should be applied at this point of these cases. It is, however, conceived that while the rule must apply to congressional enactments there may be a difference, where State laws are involved, where there is a degree of necessity for confining the language used to State concerns, the presumption being that the legislature, even by the use of language apparently the most general, does not intend to exceed its jurisdiction. Endlich on Interpretation of Statutes, sec. 169. But without deciding the point, and assuming, as is probably fair, that the legislature only meant the act in question to refer to changes of freight rates on local commerce, it still seems to the court that it is subject to several objections which cannot be overcome.

First. If one railroad should be convicted by the commission of having been "guilty of extortion," and if a lower rate should consequently be fixed by it, such rate is prescribed for the guilty railroad alone and for none of the others. The effect of the determination that the railroad has been guilty of extortion is individual. This being so, the others are still at liberty to charge as proper a rate which if charged by the one thus convicted would be deemed extortion, thus not merely inflicting a single penalty for a single offense, but placing the guilty railroad at the disadvantage of having a lower rate than its rivals and depriving it of the equal protection of the laws. It cannot be just; it cannot be an
40 equality of right or of protection for an act to be unlawful if done by one railroad in Kentucky and perfectly lawful if done by another railroad in the same State.

Second. The investigation of a complaint and the decision thereon by the commission that the railroad complained *of* is "guilty of extortion" being the only way to put the act in motion, the railroad is entitled to first have a judicial determination of the question of its guilt before the rate can be lowered as a penalty for the act charged to have been committed. The commission cannot judicially nor by due process of law determine the one question upon which its right to fix a lower rate must depend. This is emphasized by the absence of any precise statutory standard by which the commission is to be guided as to what is an extortionate charge. The

railroads have the inherent right to charge and collect a just and reasonable rate. Nothing short of a judicial proceeding conforming to due process of law, which not only includes due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion as a basis for imposing the arbitrary penalty of lowering their customary rates and as furnishing a stepping stone to ulterior penalties of great severity which it is the obvious purpose of the act to have inflicted. The legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an offense and lower its rates alone as the penalty of such conviction.

Third. The most prominent feature of this legislation is the manifest purpose, if possible, to regulate rates by severe punishments for single offenses rather than by means of real attempts to solve the immense problem of fair and reasonable freight and passenger charges by industrious and earnest efforts to ascertain what they should be.

41 But even if the spirit of the statute be extreme and harsh rather than moderate and fair, this would be unavailing to the complainants if the provisions of the act had been kept within constitutional bounds. As already indicated, the act does not fix nor attempt to fix nor require the fixing of rates equally and generally for all. It aims alone at single instances and as a condition precedent to the right of the commission to make any change in any existing rate it requires that the commission shall find the railroad guilty of extortion without defining in any precise sense what that is. Of the hearing upon the charge before the non-judicial administrative body a species of notice and an opportunity to be heard as to the reasonableness and justness of the rates is given. But all that is thus done is preliminary to having a justification for the further step, if the railroad charges an excess rate over this thus fixed, of having it convicted of another and further extortion without any provision in the act that the judicial tribunal which shall try the accused for that offense may investigate and decide whether the rate fixed in this extraordinary preliminary proceeding before the administrative body was reasonable or just. No opportunity for such an investigation is afforded by the statute when the courts are given jurisdiction of the cases, and it is by no means certain that those courts would feel constrained to give the relief on the absence of an express statutory requirement. These considerations, therefore, seem to bring this case wit-in the principle first above quoted from the opinion of the Supreme Court in the Minnesota case. If it had been the intention of the legislature to recognize the right to a judicial investigation of the reasonableness of the rates fixed under the provisions of the act and to afford an opportunity therefor before a conviction upon an indictment for extortion,

42 it would have said so in unmistakable terms, in order that the accused might not be left to the doubtful chances of mere construction, not only as to the existence of that right, but as to the competency of a criminal court in a criminal case without a commissioner or adequate equipment to enforce it. It is, indeed,

manifest from the entire scope and plan of the enactment and its operation upon mere isolated cases only that it was the purpose to exclude all inquiry upon that subject after the commission had acted and to enforce, by rigorous and extravaga-te penalties, the rates this fixed, however reasonably and earnestly the railroad might desire to promptly have the question of the justness of those rates finally determined by a judicial inquiry. Upon the principles so often and so emphatically announced by the Supreme Court, this purpose this plainly written in the legislation must be fatal to its validity. It is fair to say generally that a railroad should take the penal consequences of charging unlawful rates, but until the customary rates fixed by itself are lawfully and constitutionally changed by the State or through its agencies the carrier should not be punished for collecting its own.

It may illustrate the subject to inquire whether punishments ought to await a final determination of what are just and reasonable rates, or whether their infliction should begin at once, with the possibility or probability of being entirely unconstitutional. Justice obviously dictates the former course, particularl- as the latter might turn out to be utter spoliation.

Viewing the act as a whole, and considering the only modes by which it can be put into operation, the court is of opinion that those modes are not due process of law, and that its enforcement
43 would deprive the railroad company of the constitutional guarantee of its rights secured by the fourteenth amendment.

Fourth. And it may be that the principles announced by the court of appeals in L. & N. R. R. Co. vs. The Commonwealth, 99 Ky., 132, by which section 816 of the Kentucky Statutes, which made it an offense for a carrier to charge more than a "just and reasonable rate," was held to be void for uncertainty, would apply in this connection, particularly as the act before us is supposed to attempt to supply what that decision held to be lacking. It seems to the court that, viewed in the light of the suggestions already made, the act in question is quite subject to some of the criticisms made upon section 816.

Fifth. As applying specially to the Louisville & Nashville Railroad Co., the court is further of opinion that the act cannot be maintained, because, without attempting directly, and probably not at all, to repeal the provisions of the charter of that company as to maximum rates, it still leaves it within the power of the commission to make it a crime for that railroad to charge the rates which its charter expressly authorizes. Again, it is not to be inferred that even if the charter of this company can be amended, it was done by implication by the act before us. And still again, as the charter of that company was passed before 1856, when the general law was first enacted reserving to the State the power thereafter to amend all charters of corporations, it probably cannot be changed at all without its consent, which it is not pretended has been given. But whether so or not, it can only be done, if at all, by language which is plain and unmistakable, and not merely by so doubtful an implication as is presented here.

Sixth. As to the case of the Chesapeake & Ohio Co. This court has jurisdiction of that action also by reason of the diverse citizenship of the parties to it, and, in the absence of any construc-
44 tion of the act by the court of appeals of Kentucky, must construe it for itself, and the court is of opinion that the act violates the constitution of the State in attempting to confer upon the commission what are judicial powers and functions, to wit, the power, after complaint and notice given, to "hear and determine" that the railroad has been "guilty of extortion," and as a consequence, after that finding, to further decide that the freight rate of that railroad for similar services shall be a lower figure. These steps, as they apply only to individual instances and are not a method of fixing rates generally, constitute the very essence of a judicial proceeding and judgment. Indeed, this ground of relief may possibly broaden out so as *per se* to aid all the others.

The court is always reluctant to interfere with the exercise by any State officer of his official functions, but in the most eminent degree the safety of the property and the rights of the citizens of the community depend upon the supremacy of the constitution.

The value of these safeguards is not diminished because individuals associate as a body corporate. They are citizens none the less, and the court must not shrink in clear cases from discharging its plain duty to uphold the dominant authority. If, as before intimated, the act in question only empowered the commission to fix rates generally and for all alike, which would be a mere administrative work, the court would not interfere until that power had been exercised and the propriety of the result called in question; but here not only may a rate in a single instance be fixed by a process plainly unconstitutional, but the most serious, not say to excessive, punitive consequences may be visited not only upon
45 railroad, but also upon the individual citizen whom it may employ. If any citizen or employé were in the meantime fined and imprisoned for non-payment of the fine he might be quite beyond adequate remedy, even if thereafter the question as to this legislation should be judicially and finally determined in accordance with the views we have expressed. Who, for example, is to compensate him for the confinement in jail? Pending this litigation, the fining and imprisonment may go on by means of judicial processes entirely beyond the reach of this court if an injunction *pendente lite* is at the threshold refused. This court cannot, except in bankruptcy matters, enjoin a proceeding in a State court. While in a criminal case under the act it might by careful practice be possible to get to the Supreme Court of the United States, the effort would be most tedious and expensive, and there might be a great multiplicity of cases growing out of numerous separate changes of rates.

It seems, therefore, better, pending a final adjudication of these most important questions, to prevent the possibility of irreparable injury to any one by an adequate order. An injunction *pendente lite* is granted in each case.

WALTER EVANS, *Judge.*

And on the 25th day of July, 1900, the following decree was entered:

46 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JULY 25, 1900.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. McCHORD ET AL., Defendants.
} Final Decree.

And now, on this day, came the complainant, The Louisville & Nashville Railroad Company, by Walker D. Hines and Helm Bruce, counsel, and came the defendants, Charles C. McChord, J. F. Dempsey, and John C. Wood, by Robert J. Breckinridge, attorney general of Kentucky; D. W. Baird and Louis McQuo-n, counsel, and on motion of the said defendants, complainant not objecting thereto, the demurrer to the whole bill heretofore filed herein by the said defendants was by consent of all parties brought on for hearing, and, having been argued by counsel, the court, being advised, considered the said bill to be sufficient and doth adjudge and order that the demurrer thereto be, and the same is, accordingly overruled.

Thereupon the court offered to give and assign time to the said defendants to answer the said bill; but the said defendants, by counsel, declined to answer herein at all and elected to stand by their demurrer.

And thereupon this cause, by consent in open court of all parties, presently came on for hearing in chief, and, all parties submitting this cause for final decree, the court doth order that the said bill of complaint be taken as confessed against the said defendants, and doth further adjudge, order, and decree that the injunction heretofore granted in this cause to restrain the said defendants, Charles C. McChord, J. F. Dempsey, and John C. Wood, from entertaining

47 any complaint against complainant, or giving any notice to or conducting any hearing against complainants, or fixing any rates, toll, or compensation which complainant may charge, collect, or receive, or from entering any such rate, toll, or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent, or employé of the complainant, or from taking any action whatever against or in relation to the complainant under said act of March 10th, 1900, entitled "An act to prevent railroad companies or corporations owning or operating a line or lines of railroad and its officers, agents, or employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribe the manner of enforcing the provisions of this act and penalties for the violation of its provisions," approved on the 10th day of March, 1900, be, and it is hereby, made perpetual, as well as to said named defendants as to their successors

in office of the railroad commission of Kentucky and their agents and servants.

And the court doth further order that the said defendants shall pay the costs of the complainant herein incurred.

The said defendants pray an appeal from the foregoing decree to the Supreme Court of the United States, which is accordingly granted upon the execution by them of a bond, with surety, to be approved by the court, in the penal sum of $500, conditioned according to law; and thereupon said defendants presented a bond with David W. Baird as surety thereon, which is approved by the court and ordered to be filed; and then came complainant and waived service of a citation upon said appeal and consented that no citation thereon should be issued.

48 And on the 25th day of July, 1900, came the parties, by counsel, and on the hearing of the complainant's bill and on the demurrer to the bill of complaint herein defendants offered to read to the court the following acts of the General Assembly of the Commonwealth of Kentucky pertaining to the complainant's charter; and thereupon it was ordered, by consent, that the said acts be, and they are, considered as read on the hearing of said demurrer and bill:

Act of March 5, 1850.
Act of March 20, 1851.
Act of December 15, 1851.
Act of January 9, 1852.
Act of February 24, 1854.
Act of March 7, 1854.
Act of January 17, 1856.
Act of February 6, 1858.
Act of February 28, 1860.
Act of May 16, 1861.
Act of February 26, 1863.
Act of January 8, 1864.
Act of February 10, 1864.
Act of March 2, 1865.
Act of February 21, 1868.
Act of March 10, 1869.
Act of March 21, 1870.
Act of March 15, 1871.
Act of March 16, 1871.
Act of February 1, 1872.
Act of March 19, 1872.
Act of February 9, 1876.
Act of March 9, 1876.
Act of March 18, 1876.
Act of March 6, 1878.
Act of January 27, 1880.
Act of February 27, 1880.
Act of January 28, 1882.
Act of April 7, 1882.
Act of April 29, 1890.

The petition for appeal is as follows:

49 Circuit Court of the United States in and for the District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

Petition on Appeal, with Allowance of Appeal.

To the Honorable Walter Evans, district judge and one of the judges of the above-named court, presiding therein:

The above-named defendants and appellants, Charles C. McChord, James F. Dempsey, and John C. Wood, in the above-entitled cause, conceiving themselves aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause under date of July 25, 1900, wherein and whereby, among other things, it was and is ordered and decreed that these defendants and appellants be perpetually enjoined from proceeding under a statute of the State of Kentucky approved March 10, 1900, to fix any rate against the complainant and appellee as directed and authorized by said statute, do hereby appeal to the Supreme Court of the United States from said order and decree for the reasons set forth in the assignment of errors, which is filed herewith, and they pray that this their petition for their said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated July 25, 1900.

KOHN & BAIRD,
R. J. BRECKINRIDGE,
ZACK PHELPS, &
LEWIS McQUOWN,
Solicitors for Defendants and Appellants.

Order.

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed and the bond is fixed at $500.00; and thereupon came the counsel for the defendants and appellants in this case and presented their appeal bond in the sum of $500.00, which is approved.

Done in open court this July 25, 1900.

____ ____,
District Judge and One of the Judges of said United States Circuit Court, Presiding Therein.

The assignment of errors above referred to is as follows:

50 Circuit Court of the United States in and for the District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

Come the defendants, Charles C. McChord, James F. Dempsey, and John C. Wood, and file the following assignment of errors upon which they and each of them will rely upon their appeal from the decree made by this honorable court on the 25th day of July, 1900, in the above-entitled cause:

1.

That the United States circuit court in and for the district of Kentucky erred in overruling the demurrer interposed by these defendants and appellants to the original bill filed in said cause.

2.

That the said court erred in rendering judgment against these defendants and appellants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the facts, as stated in the bill of complaint in said cause.

3.

That the said court erred in rendering a perpetual order of injunction against these defendants and appellants.

4.

That the said court erred in holding that it had jurisdiction of these defendants and appellants upon the subject-matter set forth in the bill of complaint, and before these defendants and appellants had proceeded under said bill to make or establish any rates against the complainant and appellee.

5.

That the said court erred in holding that under the statute of the State of Kentucky complained of these defendants and appellants act as a judicial body or are delegated judicial powers, contrary to the constitution of the State of Kentucky.

51 6.

That the said court erred in holding that the said statute complained of deprives the complainant and appellee of its property without due process of law or denies to the complainant and appellee the equal protection of the law, as guaranteed by the fourteenth amendment of the Constitution of the United States.

7.

That the said court erred in holding that the said statute complained of attempts to regulate interstate commerce and is in violation of article 1, § 8, of the Constitution of the United States.

8.

That the said court erred in holding that the said statute complained of is void and unconstitutional because it does not provide a judicial hearing for the complainant and appellee with reference to the rates to be fixed thereunder or after said rates shall have been fixed.

9.

That the said court erred in holding that the said statute complained of is void because it does not provide that the rates which shall be fixed thereunder shall apply to all railroads in the State of Kentucky, and that because of said failure the said statute denies to the complainant and appellee the equal protection of the law.

10.

That the said court erred in holding that the complainant and appellee under its charter has a contract with the State of Kentucky whereby its rates have been fixed, and that the statute complained of violates its said contract, as forbidden by article 1, § 10, of the Constitution of the United States.

Wherefore the said defendants and appellants on appeal pray that the judgment of said court be reversed.

KOHN & BAIRD,
R. J. BRECKINRIDGE,
ZACK PHELPS, &
LEWIS McQUOWN,
Counsel for Defendants.

The appeal bond above referred to is as follows:

52 Circuit Court of the United States, District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. WOOD.

Know all men by these presents that we, C. C. McChord, J. F. Dempsey, and John C. Wood, and D. W. Baird, are held and firmly bound unto the Louisville & Nashville Railroad Company in the sum of five hundred dollars, to be paid to the said Louisville & Nashville Railroad Company, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, *jointly and severally, and our and each of our heirs, executors, and administrators*, firmly by these presents.

Sealed with our seals and dated this 25th day of July, A. D. 1900.

Whereas the above-named C. C. McChord, J. F. Dempsey, and John C. Wood hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named C. C. McChord, J. F. Dempsey, and John C. Wood shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. C. McCHORD,
J. F. DEMPSEY,
JOHN C. WOOD,
By LEWIS McQUOWN, *Att'y.*
DAVID W. BAIRD.

Sealed and delivered in presence of—
THOS. SPEED, *Clerk.*

53 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 52 pages contain a true and correct transcript of the record and proceedings in the case of Louisville & Nashville Railroad Company *vs.* C. C. McChord *et al.*, No. 6814, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 2d day of August, A. D. 1900.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
Deputy Clerk.

Endorsed on cover: File No., 17,881. Kentucky C. C. U. S. Term No., 396. Charles C. McChord, James F. Dempsey, and John C. Wood, appellants, *vs.* The Louisville & Nashville Railroad Company. Filed August 21st, 1900.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 142.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

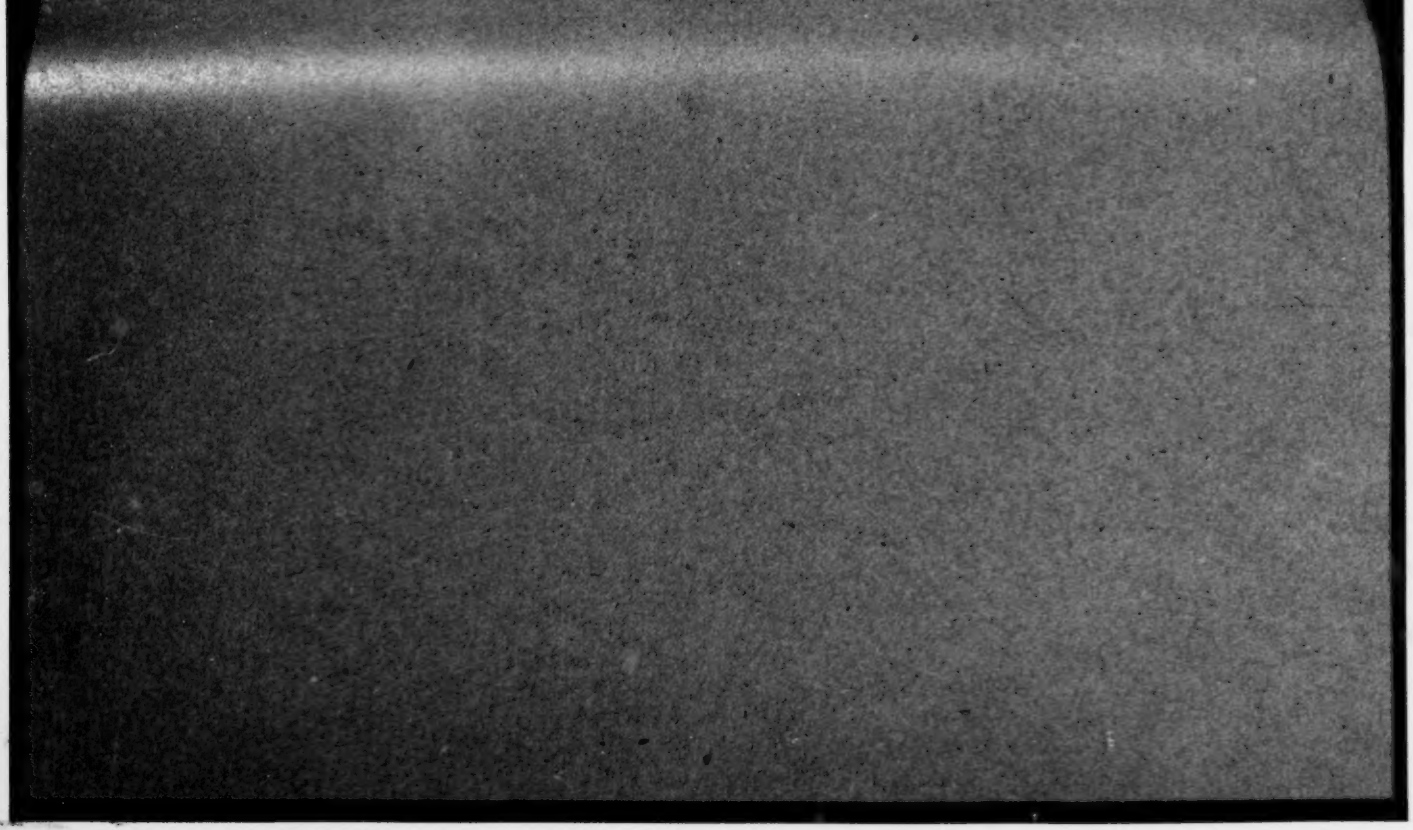
vs.

THE LOUISVILLE, HENDERSON AND ST. LOUIS RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 21, 1900.

(17,882.)



(17,882.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 397.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

vs.

THE LOUISVILLE, HENDERSON AND ST. LOUIS RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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Judd & Detweiler, Printers, Washington, D. C., August 22, 1900.

1 Proceedings of the circuit court of the United States for the district of Kentucky at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 19th, A. D. 1900.

Present: Hon. Walter Evans, sitting as circuit judge.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY CO., Complainant,
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. WOOD, Defendants. } No. 6815.

Be it remembered that heretofore, to wit, on the 5th day of July, A. D. 1900, came the complainant in the above-entitled cause and filed its bill of complaint herein against the above-named defendants; which said bill of complaint is as follows:

2 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. WOOD.

To the judges of the circuit court of the United States for the district of Kentucky:

The Louisville, Henderson & St. Louis Railway Company, a corporation organized under and pursuant to the laws of the State of Kentucky and having its principal place of business in the city of Louisville, in said State, brings this its bill against C. C. McChord, of Springfield, Washington county, Kentucky; J. F. Dempsey, of Madisonville, Hopkins county, Kentucky, and John C. Wood, of Mt. Sterling, Montgomery county, Kentucky, all of whom are citizens of the State of Kentucky; and thereupon your orator complains and says that the amount in controversy herein far exceeds the sum and value of ten thousand dollars, exclusive of interest and costs.

1. Your orator was incorporated and organized under the general statutes of Kentucky providing for the incorporation of railroad companies, and as such has the power to contract and be contracted with, to sue and to be sued, and generally the power granted by said act of incorporation to railroad companies is Kentucky.

Your orator's road extends from West Point, Kentucky, to Henderson, Kentucky, and from Irvington, Kentucky, to Fordsville, Kentucky, and from a point on the last-named road there is a branch running to Fordsville of about four miles long.

3 Your orator says that while its road lies wholly within Kentucky, yet it is nevertheless a link in a through system of roads, and much of the traffic hauled over orator's road is interstate traffic, and through rates are made from points of origination in

and beyond Kentucky to points of destination in and beyond Kentucky.

What proportion the traffic wholly within Kentucky bears to the whole traffic your orator is unable to say.

4 2. Defendants herein are holding and exercising the offices of railroad commissioners of the State of Kentucky, having been duly elected thereto and qualified therefor, and as such constitute the railroad commission of said State, and as such claim and unless restrained by the orders of this court will exercise the right to fix rates for the transportation of passengers and property over the various lines of your orator's railroad by virtue of an alleged act of the General Assembly of the Commonwealth of Kentucky, which it is claimed became a law on the — day of March, 1900, and took effect on the 12th day of June, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto and prescribing the manner of enforcing the provisions of this act and penalties for the violations of its provisions." The said act consists of five sections in the following words, to wit:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission, to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been guilty of extortion, said commission shall make and fix a just and reasonable rate, toll

5 or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent, or employee thereof, charge, collect or receive a greater or higher rate, toll, or compensa-

tion, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum, not less than two thousand dollars nor more than five thousand dollars.

SEC. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending and the circuit court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

SEC. 3. Prosecutions under this act shall be by indictment.

SEC. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

SEC. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

6 By said act said railroad commission is authorized and required, when complaint is made or when it receives information or has reason to believe that any railroad company or corporation is charging, collecting, or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, to hear and determine the matter as speedily as possible, and before doing so to mail not less than ten days beforehand a notice to any officer, agent, or employé of said company or corporation—for example, to a brakeman or section hand—stating the time and place of the hearing and the nature of the matter to be investigated.

Said railroad commission is further authorized and required by said act, if upon such investigation made upon such notice it shall determine that said company or corporation is or has been guilty of extortion in the particulars charged, to make and fix, without any notice and without any investigation, what it shall deem to be a just and reasonable rate, toll, or compensation which said company or corporation may thereafter charge, and said rate, toll, or compensation so fixed shall be in full force and effect at the expiration of ten days after the said commission shall have mailed a copy of the order fixing the same to any officer, agent, or employé of the said company or corporation affected thereby—for example, as above stated, such notice may be mailed to a brakeman or section hand—and at all times thereafter said commission may, at any time and without any notice and without any investigation, modify or change the rates thus fixed by it; and if said company or corporation or

any of its officers, agents, or employés shall thereafter charge, collect, or receive a greater rate than that made and fixed by said commission, as above stated, said company or corporation and said officers, agents, and employés are each by said act made guilty of extortion and, upon conviction, are each to be fined for the first offense not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars.

7 Thus, under said act, said railroad commission is authorized to fix the rates of your orator and all other railroad companies or corporations without any notice and without any investigation from or by it. The rates so fixed are to go into full force and effect simply by the lapse of ten days from the date of the mailing of the copy of the order fixing the same to any officer, agent, or employé of the railroad company or corporation, and unless the railroad company or corporation affected thereby straightway complies with said rate, although such rate may be a palpable invasion of such company's or corporation's constitutional rights, such corporation will be subject to the excessive fines fixed in said act with respect to each shipment passing over its road to which said commission desires said rates so fixed to apply, and every officer, agent, or employé of said company or corporation either charging, collecting, or receiving the rate fixed and charged by said company or corporation for each of such shipments in question, although the said corporation may have full right and power under the Constitution of the United States to charge such rate, will likewise be subjected to said excessive fines.

3. All of your orator's rates charged, collected, or received within the State of Kentucky are just and reasonable and have not been sufficient for many years to give it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skilful manner.

8 4. It is the duty of said railroad commission, composed, as aforesaid, of the defendants herein, to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State. To this end they are authorized and required to inquire into the management of affairs of railroad companies; to inspect and examine their tracks, bridges, tunnels, and other structures; to supervise facilities at stations, and in many other ways to exercise administrative functions with respect to the railroads of said State. The constitution of said State divides the powers of its government into three distinct departments, each to be confined to a separate body of magistracy—those which are legislative to one, those which are executive to another, and those which are judicial to another—and declares that no person or collection of persons being of one of those departments shall exercise any power properly belonging to either of the others, except in the instances expressly directed and per-

mitted in said constitution. By said constitution the judicial power of said State is vested in the senate, when sitting as a court of impeachment, and one supreme court, to be styled the court of appeals, and the courts established by said constitution, to wit, circuit courts, quarterly courts, county courts, justices' courts, police courts, and fiscal courts. The said railroad commission is not established as a court by said constitution and is not expressly directed or permitted by said constitution to exercise any judicial powers; on the contrary, its powers are essentially and purely of an administrative character, and it essentially belongs to the executive department of the State government. The laws of said State not only fail to confer upon it judicial functions or powers, but prohibit the conferring of any such powers upon it, and by reason of the administrative functions with respect to the conduct and regulation of railroads which said commission is required and authorized to perform it is rendered essentially unfit to exercise judicial functions.

9 5. While all other common carriers, whether operating railroads or not, are subject only to the requirement that their rates are just and reasonable, and in case of controversy are entitled to have the judgment of the courts upon that question, the said act hereinbefore referred to singles out railroad corporations and denies them the equal protection of the laws applying to all other common carriers, and deprives said railroad corporations of any opportunity to have a judicial determination of the reasonableness of their rates when the same are called in question, and substitutes therefor the determination of said railroad commission, which is not and cannot be a court and which does not afford and cannot afford a judicial hearing or determination of questions brought before it; and whereas all other common carriers in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or consequence attaches to such judicial determination, yet railroad corporations are to be subjected, in the absence of any judicial determination as to whether their rates are reasonable or otherwise, and simply upon the determination of said non-judicial tribunal, the railroad commission, that such rates are unreasonable, to the penalty of having the power to make their rates taken out of their hands and vested exclusively in said railroad commission, which commission is then without any hearing, judicial or otherwise, to fix such rates as it may choose, and is thereafter without any notice and without any hearing, judicial or otherwise, to have the right at its pleasure to modify the rates so fixed by it, and if said railroad corporations fail to charge the rates thus fixed for them by this unjust and unconstitutional procedure they will be subjected for every shipment passing over their lines to which said railroad commission may desire said rates so fixed by it to apply to the prosecutions, fines, and penalties imposed in said act.

10 6. Your orator submits that under the Constitution of the United States it is entitled to charge reasonable rates for the

use of its property, and that it cannot be compelled to charge rates fixed by the railroad commission of Kentucky in the absence of a judicial investigation and determination that the rates so fixed are just and reasonable; that the said act makes no provision for any investigation or determination even by the railroad commission that the rates fixed by it are just and reasonable, and the said commission may fix such rates without any notice to the railroad corporations to which said act applies as to what said commission proposes to do and without any investigation of the questions involved, and may thereafter change or modify said rates without any notice or investigation; but that even if said commission should choose to give notice and investigate such questions, such investigation and resulting determination would not satisfy your orator's constitutional rights to a judicial determination, because said commission is not a court, nor is it clothed with judicial functions, but, on the contrary, it is an administrative tribunal, which, under the law, cannot exercise judicial functions, and which, by reason of the functions it does exercise, is in its nature incapable of affording the judicial investigation to which your orator is entitled, and by said act your orator is denied the privilege and right to have it judicially determined by a court of competent jurisdiction whether the rates fixed and charged by it are just and reasonable, and whether the rates fixed by said commission amount to a confiscation and spoliation of its property. If, therefore, defendants be permitted to proceed under said act, your orator will be compelled to charge the rates fixed by them without any opportunity for a judicial investigation and determination as to their reasonableness, and it will thus be deprived of the lawful use of its property and in substance and effect of its property itself without due process of law, and will also be denied the equal protection of the laws, in violation of section 1 of article 14 of the amendments to the Constitution of the United States.

11 7. Your orator further says that the said act of March, 1900, relates to all freight and passenger rates charged, collected, or received by railroad companies in the Commonwealth of Kentucky, and is not restricted to rates actually charged, collected, and received, within the Commonwealth of Kentucky, for transportation commencing and ending within the said State, and therefore by its terms is an express and direct interference with and regulation of commerce among the States, and therefore the said act is in conflict with paragraph 3 of section 8 of article 1 of the Constitution of the United States, which gives to the Congress of the United States exclusive power to regulate commerce among the States, and which power has been exercised by Congress by an act of February 4, 1887, entitled "An act to regulate commerce among the States," and by the acts amendatory thereof, and that said act of March —, 1900, is therefore null and void.

And defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroads in the State of Kentucky for the purpose of considering whether or not they shall be altered and re-

duced in accordance with the terms of said act, and are giving it out in speeches and interviews that they intend to proceed at once under said act, and unless restrained by the order of this court defendants will proceed at once to hear and determine complaints under said act, although the same is in contravention of the Constitution of the United States in all the particulars hereinabove set out, and is therefore null and void, and will proceed thereupon to reduce your orator's rates to such as they think your orator should charge, and will thereafter at pleasure modify and still further reduce the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the State of Kentucky for failing to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by con-

12 signors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offense and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted, and heavily fined, to the great demoralization of the public service which your orator is bound to render, and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator's contract rights will be impaired, it will be deprived of its property without due process of law, denied the equal protection of the law, and subjected to great — irreparable wrong and injury and to a vast multiplicity of prosecutions and actions in the courts of said State.

Forasmuch as your orator can have no adequate relief except in this court, and to the end that the defendant- may, if they can, show why your orator shall not have the relief herein prayed, and that they answer this bill according to the course and practice of the court, but not under oath, the answer of each of them under oath being hereby expressly waived, your orator prays that said act of March —, 1900, be decreed and be declared to be in contravention of the Constitution of the United States, and therefore null and void, and that until the further order of the court said defendants be enjoined from taking any action whatever against or in relation to complainant under said act; that said injunction may be perpetual upon final hearing, and as irreparable injury to your orator may ensue if defendants should take any action against or in relation to your orator under said act before the motion for a preliminary injunction can be heard, your orator prays that an order be granted restraining defendants from doing the acts herein sought to be enjoined, and your orator prays for such other and further relief as in equity it may be entitled to, and further prays that your honors also grant unto your orator a writ of subpœna of the United States of America, directed to the said C. C. McChord,

13 J. F. Dempsey, and John C. Wood, commanding them on a day certain to appear and answer this bill and to abide and

perform such order and decree as to your honor- shall seem meet and equitable; and your orator will ever pray, etc.

HELM, BRUCE & HELM,
Solicitor- for Complainant.

UNITED STATES OF AMERICA, *District of Kentucky,* } ss:

On this 5th day of July, 1900, before me personally appeared Attilla Cox, the president of The Louisville, Henderson & St. Louis Railway Company, the complainant above named, who, being duly sworn, deposes and says that he is the president of the Louisville, Henderson & St. Louis Railway Company and familiar with its business, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ATTILLA COX.

Subscribed and sworn to before me this 5th day of July, 1900.

HUSTON QUIN,
N. P. J. C., Ky.

My commission expires with the next session of the Kentucky senate.

14 And upon the bill there issued the following process:

The President of the United States of America to Charles C. McChord, James F. Dempsey, and John C. Wood, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in city of Louisville, on the first Monday in August next, to answer a bill in equity exhibited against you in our said court by Louisville, Henderson & St. Louis Railway Company, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of said court, in Louisville, this 5 day of July, A. D. 1900, and in the 125 year of our Independence.

Attest:

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 6th day of August next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk.*
HENRY F. CASSIN,
His Deputy.

And thereupon the marshal made the following returns:

A. D. 1900.—Executed this 13th day of July, 1900, at Mt. Sterling, Kentucky, by delivering a true copy of the within spa. in ch'y to John C. Wood.

A. D. JAMES,
U. S. Marshal,
By C. McCARTY, *D. M.*

15 Came to hand July the 6th, 1900.

A. D. JAMES, *U. S. M.*,
By LAWRENCE YONTS,
Deputy U. S. M. for the District of Kentucky.

Executed on James F. Dempsey by delivering to him a copy hereof this July the 9th, 1900.

A. D. JAMES,
U. S. Marshal,
By LAWRENCE YONTS,
Deputy U. S. Marshal for the District of Kentucky.

Executed the within on Charles C. McChord, at his residence, in Springfield, Ky., by delivering to him a true copy of this spa. in ch'y.
This July 23, 1900.

A. D. JAMES, *U. S. Marshal,*
By G. C. THOMPSON, *D. U. S. M.*

16 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JULY 9TH, 1900.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY, Complainant,
vs.
C. C. McCHORD, &c., Defendants.
} Order.

This day came the complainant, by Helm, Bruce & Helm, and produced herein notices, duly served upon the defendants, that the complainant would upon this day enter the motion for an interlocutory injunction in the terms of the prayer of its bill of complaint herein.

And thereupon came the defendants, by the Honorable Robert J. Breckinridge, attorney general of Kentucky, but not waiving any objections to the jurisdiction of the court or other objections to the maintenance or conduct of this suit, but expressly reserving the same; and the complainant thereupon moved the court to grant to it an interlocutory injunction in accordance with the terms of the prayer of its bill of complaint herein; to which the defendants objected.

And thereupon, by consent, the said motion is assigned to the 13th day of July, 1900, at ten o'clock a. m., for hearing, it being agreed and so ordered that in the meantime the *status quo* shall be pre-

served and no effort made by the defendants to enforce the terms of the act of the legislature set out in the bill of complaint and commonly known as the McChord law against this complainant.

The notice above referred to is as follows:

17 Circuit Court of the United States in and for the District of Kentucky.

LOUISVILLE, HENDERSON & ST. LOUIS RAILROAD COMPANY, Complainant,
vs.
CHARLES C. McCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.
} Notice.

GENTLEMEN: You are hereby notified that on Monday, July 9, 1900, at or about the hour of ten a. m., the complainant in the above-entitled cause will, before the United States circuit court, sitting at Louisville, Kentucky, move the court for a temporary injunction in accordance with the prayer of its bill of complaint herein this day filed, and a copy of which bill of complaint accompanies this notice and is to be served upon Charles C. McChord, the chairman of the railroad commission of Kentucky.

July 5th, 1900.

Respectfully,

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY,
By HELM, BRUCE AND HELM, *Solicitors.*

To Hon. Charles C. McChord, Hon. James F. Dempsey, Hon. John C. Wood.

18 In the Circuit Court of the United States, District of Kentucky.

LOUISVILLE, HENDERSON & ST. LOUIS RAILROAD CO., Complainant,
vs.
CHARLES C. McCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

E. C. Turner, being duly sworn, states that he served the foregoing notice and the bill of complaint therein referred to upon the therein-named Charles C. McChord on the 5th day of July, 1900, by delivering to the said Charles C. McChord, at Springfield, Ky., at 7.45 p. m., on said date, a copy of the said notice and a copy of the said bill of complaint, and that he served the said notice upon the therein-named James F. Dempsey on July 6, 1900, by delivering to him a copy of the said notice at Louisville, Ky., at 9.50 a. m. on said date.

And Thos. B. Harrison, Jr., being duly sworn, states that he served the foregoing notice upon the therein-named John C. Wood on July 5th, 1900, by delivering a copy of said notice to said John C. Wood, at Mt. Sterling, Ky., at 9.45 p. m. on said date.

E. C. TURNER.
THOS B. HARRISON, JR.

Subscribed and sworn to before me by E. C. Turner and Thos. B. Harrison, Jr., respectively, this 6th day of July, 1900. My commission expires January 8, 1903.

G. W. B. OLMSTEAD,
Notary Public, Jefferson Co., Ky.

19 And on the 13th day of July, 1900, came the complainants, by Helm, Bruce & Helm, i-s counsel.

Came also the defendants, by Louis McQuown and D. W. Baird, their counsel, and filed their demurrer to the bill of complaint herein.

The complainant's motion heretofore entered herein for an interlocutory injunction coming on to be heard and having been argued by counsel, and the court, not being advised thereof, takes time.

The demurrer above referred to is as follows:

20 Circuit Court of the United States in and for the District of Kentucky.

LOUISVILLE, HENDERSON & ST. Louis Railroad Co., Complain-t, *vs.* CHARLES C. MCCHORD, JAMES F. Dempsey, and John Wood, Defendants.	The Demurrer of Charles C. McChord, James F. Dempsey, and John C. Wood.

These defendants, Charles C. McChord, James F. Dempsey, and John C. Wood, jointly and severally, not confessing all nor any of the matters in the bill of complaint contained to be true as therein set forth, do demur to said bill for that the same does not state such a case nor contain any matter of equity entitling the complainant to any relief against these defendants or any of them; that this court is without jurisdiction to proceed, hear, or determine the matters set forth in said bill; that the complainant has a full and adequate remedy at law.

Wherefore they pray the judgment of the court whether they shall be compelled to further answer said bill, and further pray to be dismissed with their costs.

ROB'T J. BRECKINRIDGE, JR.
D. W. BAIRD.
AARON KOHN.
ZACK PHELPS.
LOUIS McQUOWN.

I, Louis McQuown, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is, in my opinion, well founded in law.

LOUIS McQUOWN.

UNITED STATES OF AMERICA,
District of Kentucky.

I, Charles C. McChord, one of the defendants in the *oge* cause, being duly sworn, do says that the foregoing demurrer to the bill of complaint is not interposed for purposes of delay.

CHAS. C. McCHORD.

Subscribed and sworn to before me by Charles C. McChord this 13th day of July, 1900.

My com. expires Jan. 13, 1904.

DAVID W. BAIRD,
N. P., J. C., Ky.

21 And on the 16th day of July, 1900, came again the complainant, The Louisville, Henderson & St. Louis Railway Company, by Helm Bruce, counsel, and came also the defendants herein, by Louis McQuown and D. W. Baird, counsel, and the court, being advised of the motion heretofore entered herein to grant to the complainant any interlocutory injunction in accordance with the terms of the prayer of the bill of complaint herein, delivered an opinion in writing, which is filed and ordered to be made a part of the record, and in consideration thereof it is adjudged, ordered, and decreed as follows: That the defendants, C. C. McChord, J. F. Dempsey, and John C. Wood, be, and they are hereby, enjoined and restrained until the further order of the court herein from entertaining any complaint against complainant, or giving any notice of or conducting any hearing against complainant, or fixing any rate, toll, or compensation which the complainant may charge, collect, or receive, or from entering any such rate, toll, or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent, or employé of the complainant, or from taking any action whatever against or in relation to complainant under said act of March 10th, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions," approved on the 10th day of March, 1900.

This order shall take effect upon the complainant's execution of a bond, with good security, to be approved by the clerk, in the penal sum of $1,000, to indemnify the defendants herein against all loss that may result from the issue of the injunction hereby ordered.

And on the 25th day of July, 1900, the following decree was entered :

22 Circuit Court of the United States, Sixth Circuit and District of Kentucky.

JULY 25, 1900.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY, Complainant,
vs.
CHARLES. C. MCCHORD ET AL., Defendants.

Final Decree.

And now, on this day, came the complainant, The Louisville, Henderson & St. Louis Railway Company, by Helm Bruce, counsel, and came the defendants, Charles C. McChord, J. F. Dempsey, and John C. Wood, by Robert J. Breckinridge, attorney general of Kentucky; D. W. Baird and Louis McQuown, counsel, and on motion of the said defendants, complainant not objecting thereto, the demurrer to the whole bill heretofore filed herein by the said defendants was by consent of all parties brought on for hearing, and, having been argued by counsel, the court, being advised, considered the said bill to be sufficient and doth adjudge and order that the demurrer thereto be, and the same is, accordingly overruled.

Thereupon the court offered to give and assign time to the said defendants to answer the said bill; but the said defendants, by counsel, declined to answer herein at all and elected to stand by their demurrer.

And thereupon this cause, by consent in open court of all parties, presently came on for hearing in chief, and, all parties submitting this cause for final decree, the court doth order that the said bill of complaint be taken as confessed against the said defendants, and doth further adjudge, order, and decree that the injunction heretofore granted in this cause to restrain the said defendants,

23 Charles C. McChord, J. F. Dempsey, and John C. Wood, from entertaining any complaint against complainant, or giving any notice to or conducting any hearing against complainant, or fixing any rates, toll, or compensation which complainant may charge, collect, or receive, or from entering any such rate, toll, or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent, or employé of the complainant, or from taking any action whatever against or in relation to the complainant under said act of March 10th, 1900, entitled "An act to prevent railroad companies or corporations owning or operating a line or lines of railroad and its officers, agents, or employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribe the manner of enforcing the provisions of this act and penalties for the violation of its provisions," approved on the 10th day of March, 1900, be, and it is hereby, made perpetual, as well *as* to said named defendants as to their successors in office of the railroad commission of Kentucky and their agents and servants.

And the court doth further order that the said defendants shall pay the costs of the complainant herein incurred.

The said defendants pray an appeal from the foregoing decree to the Supreme Court of the United States, which is accordingly granted upon the execution by them of a bond, with surety, to be approved by the court, in the penal sum of $500, conditioned according to law; and thereupon said defendants presented a bond with David W. Baird as surety thereon, which is approved by the court and ordered to be filed; and then came the complainant and waived service of a citation upon said appeal and consented that no citation thereon should be issued.

24 The petition for appeal above referred to is as follows:

Circuit Court of the United States in and for the District of Kentucky.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

Petition on Appeal, with Allowance of Appeal.

To the Hon. Walter Evans, district judge and one of the judges of the above-named court, presiding therein:

The above-named defendants and appellants, Charles C. McChord, James F. Dempsey, and John C. Wood, in the above-entitled cause, conceiving themselves aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause under date of July 25, 1900, wherein and whereby, among other things, it was and is ordered and decreed that these defendants and appellants be perpetually enjoined from proceeding under a statute of the State of Kentucky approved March 10, 1900, to fix any rate against the complainant and appellee as directed and authorized by said statute, do hereby appeal to the Supreme Court of the United States from said order and decree for the reasons set forth in the assignment of errors, which is filed herewith, and they pray that this their petition for their said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated July 25, 1900.

KOHN & BAIRD,
R. J. BRECKINRIDGE,
ZACK PHELPS, &
LEWIS McQUOWN,
Solicitors for Defendants and Appellants.

Order.

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed and the bond is fixed at $500.00; and thereupon came the counsel for the defendants and appellants in this case and presented their appeal bond in the sum of $500.00, which is approved.

Done in open court this July 25, 1900.

____ ____,

District Judge and One of the Judges of said United States Circuit Court, Presiding Therein.

25 The assignment of errors above referred to is as follows:

Circuit Court of the United States in and for the District of Kentucky.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

Come the defendants, Charles C. McChord, James F. Dempsey, and John C. Wood, and file the following assignment of errors upon which they and each of them will rely upon their appeal from the decree made by this honorable court on the 25th day of July, 1900, in the above-entitled cause:

1.

That the United States circuit court in and for the district of Kentucky erred in overruling the demurrer interposed by these defendants and appellants to the original bill filed in said cause.

2.

That the said court erred in rendering judgment against these defendants and appellants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the facts, as stated in the bill of complaint in said cause.

3.

That the said court erred in rendering a perpetual order of injunction against these defendants and appellants.

4.

That the said court erred in holding that it had jurisdiction of these defendants and appellants upon the subject-matter set forth in the bill of complaint, and before these defendants and appellants had proceeded under said bill to make or establish any rates against the complainant and appellee.

5.

That the said court erred in holding that under the statute of the State of Kentucky complained of these defendants and appellants act as a judicial body or are delegated judicial powers, contrary to the constitution of the State of Kentucky.

26

6.

That the said court erred in holding that the said statute complained of deprives the complainant and appellee of its property without due process of law or denies to the complainant and appellee the equal protection of the law, as guaranteed by the fourteenth amendment of the Constitution of the United States.

7.

That the said court erred in holding that the said statute complained of attempts to regulate interstate commerce and is in violation of article 1, § 8, of the Constitution of the United States.

8.

That the said court erred in holding that the said statute complained of is void and unconstitutional because it does not provide a judicial hearing for the complainant and appellee with reference to the rates fixed thereunder or after said rates shall have been fixed.

9.

That the said court erred in holding that the said statute complained of is void because it does not provide that the rates which shall be fixed thereunder shall apply to all railroads in the State of Kentucky, and that because of said failure the said statute denies to the complainant and appellee the equal protection of the law.

Wherefore the said defendants and appellants on appeal pray that the judgment of said court be reversed.

KOHN & BAIRD,
R. J. BRECKINRIDGE,
ZACK PHELPS, &
LEWIS McQUOWN,
Counsel for Defendants.

The appeal bond above referred to is as follows:

27 Circuit Court of the United States, District of Kentucky.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY
vs.
C. C. McCHORD, J. F. DEMPSEY, & JOHN C. WOOD.

Know all men by these presents that we, C. C. McChord, J. F. Dempsey, John C. Wood, and David W. Baird, are held and firmly bound unto Louisville, Henderson & St. Louis Railway Company in the sum of five hundred dollars, to be paid to the said Louisville, Henderson & St. Louis Railway Company, executors or adminis-

rators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 25th day of July, A. D. 1900.

Whereas the above named C. C. McChord, J. F. Dempsey, and John C. Wood hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named C. C. McChord, J. F. Dempsey, and John C. Wood shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. C. McCHORD,
J. F. DEMPSEY,
JOHN C. WOOD,
By LEWIS McQUOWN, *Att'y.*

Sealed and delivered in presence of—
THOS. SPEED, *Clerk.*

28 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 27 pages contain a true and correct transcript of the record and proceedings in the case of Louisville, Henderson & St. Louis Railway Co. *vs.* C. C. McChord *et al.*, No. 6815, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 2d day of August, A. D. 1900.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
Deputy Clerk.

Endorsed on cover: File No., 17,882. Kentucky C. C. U. S. Term No., 397. Charles C. McChord, James F. Dempsey, and John C. Wood, appellants, *vs.* The Louisville, Henderson & St. Louis Railway Company. Filed August 21st, 1900.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 893 143.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 21, 1900.

(17,883.)

(17,883.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 398.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 22, 1900.

1 Proceedings of the circuit court of the United States for the district of Kentucky at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 19th, A. D. 1900.

Present: Hon. Walter Evans, sitting as circuit judge.

CHESAPEAKE & OHIO RAILWAY COMPANY, Complainant,
vs.
C. C. MCCHORD, J. F. DEMPSEY, & JOHN C. WOOD, Defendants. } No. 6816.

Be it remembered that heretofore, to wit, on the 5th day of July, A. D. 1900, came the complainant in the above-entitled cause and filed its bill of complaint herein against the above-named defendants; which said bill of complaint is as follows:

2 In the Circuit Court of the United States in and for the District of Kentucky.

CHESAPEAKE & OHIO RAILROAD COMPANY
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, and JOHN C. WOOD.

To the honorable the judges of the circuit court of the United States in and for the district of Kentucky:

The Chesapeake & Ohio Railroad Company, a corporation created, organized, and existing under and by virtue of the laws of the State of Virgina and a citizen thereof and having its principal place of business in the city of Richmond, in said State, brings this its bill against Charles C. McChord, of Springfield, Washington county, Kentucky; James F. Dempsey, of Madisonville, Hopkins county, Kentucky, and John C. Wood, of Mt. Sterling, Montgomery county, Kentucky, each of whom is a citizen of the State of Kentucky and an inhabitant of the district of Kentucky.

And thereupon your orator complains and says that the amount in controversy herein far exceed- the sum and value of ten thousand dollars, exclusive of interest and costs.

1. That your orator conducts and operates as a common carrier of freight and passengers more than 444 miles of railroad in the State of Kentucky as a part of your orator's system of railroads, of more than 14,444 miles in extent, traversing the States of Maryland, Virginia, West Virginia, Kentucky, and Ohio, which system is operated as a whole; that over its said line in the State of Kentucky it carries a very large traffic, both passengers and freight and both State and interstate, and about 80 per cent. of the traffic passing over its lines in the State of Kentucky is interstate traffic in the strictest sense, and much of the remainder is virtually interstate traffic, the rates upon which have a direct and far-reaching influence upon commerce among the States.

3 2. That defendants herein are holding and exercising the offices of railroad commissioners of the State of Kentucky, having been duly elected thereto and qualified therefor, and as such constitute the railroad commission of said State, and as such claim and unless restrained by the orders of this court will exercise the right to fix rates for the transportation of passengers and property over the various lines of your orator's railroad by virture of an alleged act of the General Assembly of the Commonwealth of Kentucky, which it is claimed became a law on the — day of March, 1900, and took effect on the 12th day of June, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto and prescribing the manner of enforcing the provisions of this act and penalties for the violations of its provisions." The said act consists of five sections in the following words, to wit:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission, to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been guilty of extortion, said commission shall make and fix a just and reasonable rate, toll
4 or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent, or employee thereof, charge, collect or receive a greater or higher rate, toll, or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense

in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum, not less than two thousand dollars nor more than five thousand dollars.

SEC. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending and the circuit court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

SEC. 3. Prosecutions under this act shall be by indictment.

SEC. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

SEC. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

5 By said act said railroad commission is authorized and required, when complaint is made or when it receives information or has reason to believe that any railroad company or corporation is charging, collecting, or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, to hear and determine the matter as speedily as possible, and before doing so to mail not less than ten days beforehand a notice to any officer, agent, or employé of said company or corporation—for example, to a brakeman or section hand—stating the time and place of the hearing and the nature of the matter to be investigated.

Said railroad commission is further authorized and required by said act, if upon such investigation made upon such notice it shall determine that said company or corporation is or has been guilty of extortion in the particulars charged, to make and fix, without any notice and without any investigation, what it shall deem to be a just and reasonable rate, toll, or compensation which said company or corporation may thereafter charge, and said rate, toll, or compensation so fixed shall be in full force and effect at the expiration of ten days after the said commission shall have mailed a copy of the order fixing the same to any officer, agent, or employé of the said company or corporation affected thereby—for example, as above stated, such notice may be mailed to a brakeman or section hand—and at all times thereafter said commission may, at any time and without any notice and without any investigation, modify or change the rates thus fixed by it; and if said company or corporation or any of its officers, agents, or employés shall thereafter charge, collect, or receive a greater rate than that made and fixed by said commission, as above stated, said company or corporation and said officers, agents, and employés are each by said act made guilty of extortion

and, upon conviction, are each to be fined for the first offense not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars.

6 Thus, under said act, said railroad commission is authorized to fix the rates of your orator and all other railroad companies or corporations without any notice and without any investigation from or by it. The rates so fixed are to go into full force and effect simply by the lapse of ten days from the date of the mailing of the copy of the order fixing the same to any officer, agent, or employé of the railroad company or corporation, and unless the railroad company or corporation affected thereby straightway complies with said rate, although such rate may be a palpable invasion of such company's or corporation's constitutional rights, such corporation will be subject to the excessive fines fixed in said act with respect to each shipment passing over its road to which said commission desires said rates so fixed to apply, and every officer, agent, or employé of said company or corporation either charging, collecting, or receiving the rate fixed and charged by said company or corporation for each of such shipments in question, although the said corporation may have full right and power under the Constitution of the United States to charge such rate, will likewise be subjected to said excessive fines.

7 3. It is the duty of said railroad commission, composed, as aforesaid, of the defendants herein, to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State. To this end they are authorized and required to inquire into the management of affairs of railroad companies; to inspect and examine their tracks, bridges, tunnels, and other structures; to supervise facilities at stations, and in many other ways to exercise administrative functions with respect to the railroads of said State. The constitution of said State divides the powers of its government into three distinct departments, each to be confined to a separate body of magistracy—those which are legislative to one, those which are executive to another, and those which are judicial to another—and declares that no person or collection of persons being of one of those departments shall exercise any power properly belonging to either of the others, except in the instances expressly directed and permitted in said constitution. By said constitution the judicial power of said State is vested in the senate, when sitting as a court of impeachment, and one supreme court, to be styled the court of appeals, and the courts established by said constitution, to wit, circuit courts, quarterly courts, county courts, justices' courts, police courts, and fiscal courts. The said railroad commission is not established as a court by said constitution and is not expressly directed or permitted by said constitution to exercise any judicial powers; on the contrary, its powers are essentially and purely of an administrative character, and it essentially belongs to the executive department of

the State government. The laws of said State not only fail to confer upon it judicial functions or powers, but prohibit the con-
8 ferring of any such powers upon it, and by reason of the administrative functions with respect to the conduct and regulation of railroads which said commission is required and authorized to perform it is rendered essentially unfit to exercise judicial functions.

4. That at present your orator, like all other common carriers in the State of Kentucky, is authorized and does fix the rates for the transportation by it of passengers and freight, subject to the requirement of law, which operates alike upon all common carriers, that such rates shall be just and reasonable, and your orator is now entitled, as are all other common carriers, to a judicial determination by the duly established courts of the State of any question as to the justice or reasonableness of all or any of such rates which the act aforesaid denies to it. Your orator avers that its rates are just and reasonable and have not been sufficient for many years to give to it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skilful manner. In addition to fixing and charging rates subject to and in conformity with the requirements of law applicable to all common carriers that their rates shall be just and reasonable, your orator is subject to and complies with all the requirements of the laws of the State of Kentucky prohibiting unjust discrimination between individuals and localities in the matter of rates, which laws do not apply to all common carriers, but are unreasonably restricted so as to apply merely to companies or corporations which operate railroads; and, further, your orator is forced to and does recognize the requirements of competition, which constantly tend to reduce rates and which affect not merely rates to or from points known as competitive points, but in a greater or less degree all rates between all points, so as to prevent any rates becoming or remaining unreasonably high.

5. That while all other common carriers, whether operating railroads or not, are subject only to the requirement that their rates are just and reasonable, and in case of controversy are entitled to have the judgment of the courts upon that question, the said act
9 hereinbefore referred to singles out railroad companies or corporations and denies them the equal protection of the laws applying to all other common carriers, and deprives said railroad companies or corporations of any opportunity to have a judicial determination of the reasonableness of their rates when the same are called in question, and substitutes therefor the determination of said railroad commission, which is not and cannot be a court and which does not afford and cannot afford a judicial hearing or determination of questions brought before it; and whereas all other common carriers in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or consequences attaches to such judicial determination, yet railroad companies or corpora-

tions are to be subjected, in the absence of any judicial determination as to whether their rates are reasonable or otherwise, and simply upon the determination of said non-judicial tribunal, the railroad commission, that such rates are unreasonable, to the penalty of having the power to make their rates taken out of their hands and vested exclusively in said railroad commission, which commission is then without any hearing, judicial or otherwise, to fix such rates as it may choose, and is thereafter without any notice and without any hearing, judicial or otherwise, to have the right at its pleasure to modify the rates so fixed by it, and if said railroad companies or corporations fail to charge the rates thus fixed for them by this unjust and unconstitutional procedure they will be subjected for every shipment passing over their lines to which said railroad commission may desire said rates so fixed by it to apply to the prosecutions, fines, and penalties imposed in said act.

6. Your orator submits that under the Constitution of the United States it is entitled to charge reasonable rates for the use of its property, and that it cannot be compelled to charge rates fixed by the railroad commission of Kentucky in the absence of a judicial investigation and determination that the rates so fixed are just and reasonable; that the said act makes no provision for any investigation or determination even by the railroad commission that the rates fixed by it are just and reasonable, and the said commission may fix such rates without any notice to the railroad companies or corporations to which said act applies as to what said commission proposes to do and without any investigation of the questions involved, and may thereafter change or modify said rates without any notice or investigation; but that even if said commission should choose to give notice and investigate such questions, such investigation and resulting determination would not satisfy your orator's constitutional rights to a judicial determination, because said commission is not a court, nor is it clothed with judicial functions, but, on the contrary, it is an administrative tribunal, which, under the law, cannot exercise judicial functions, and which, by reason of the functions it does exercise, is in its nature incapable of affording the judicial investigation to which your orator is entitled, and by said act your orator is denied the privilege and right to have it judicially determined by a court of competent jurisdiction whether the rates fixed and charged by it are just and reasonable, and whether the rates fixed by said commission amount to a confiscation and spoliation of its property. If, therefore, defendants be permitted to proceed under said act, your orator will be compelled to charge the rates fixed by them without any opportunity for a judicial investigation and determination as to their reasonableness, and it will then be deprived of the lawful use of its property and of substance and effect of the property itself without due process of law, in violation of section 1 of article 14 of the amendment to the Constitution of the United States; and whereas all other persons in the State of Kentucky but railroad corporations are permitted to receive reasonable profits from their invested cap-

ital, your orator and other railroad companies or corporations will by said act be deprived of the equal protection of the laws.

11 7. That the defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroad in the State of Kentucky for the purpose of considering whether or not said rates in their judgment are unreasonable and extortionate and of fixing rates to be charged by it if they so determine, and it is their intention and purpose to hear complaints under said act, and upon such complaints being made to determine whether the rates complained of are unreasonable and extortionate, and, if they so determine, to fix rates to be charged by it instead of those complained of, and the defendants are giving it out in speeches and interviews that they intend so to proceed and unless restrained by the order of this court they will proceed to act under said act, hear and determine complaints thereunder, and fix such rates as they think your orator should charge, and will thereafter at pleasure modify the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the State of Kentucky for failure to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offense and though merely assisting your orator to maintain its constitutional rights, will be indicated, prosecuted, and heavily fined, to the great demoralization of the public service which your orator is bound to render, and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator will be deprived of its property without due process of law, denied the equal protection of the law, subjected to great and irreparable wrong and injury and to a vast multiplicity of prosecutions in the courts of the State.

12 Forasmuch as your orator can have no adequate relief except in this court, and to the end that the defendants may, if they can, show why your orator shall not have the relief herein prayed, and that they answer this bill according to the course and practice of the court, but not under oath, the answer of each of them under oath being hereby expressly waived, your orator prays that the said act of March, 1900, be decreed and be declared to be in contravention of the Constitution of the United States, and therefore null and void, and that until the further order of the court said defendants be enjoined from taking any action whatever against or in relation to complainant under said act; that said injunction may be made perpetual upon final hearing, and as irreparable injury to your orator may ensue if defendants should take any action against or in relation to your orator under said act before the motion for a preliminary injunction can be heard, your orator prays that an order be granted restraining defendants from doing the acts herein

sought to be enjoined, and your orator prays for such other and further relief as in equity it may be entitled to, and further prays that your honors also grant unto your orators a writ of subpœna of the United States of America, directed to the said C. C. McChord, J. F. Dempsey, and John C. Wood, commanding them on a day certain to appear and answer this bill and to abide and perform such order and decree as to your honors shall seem meet and equitable; and your orator will ever pray, etc.

WADSWORTH & COCHRAN,
Solicitors for Complainant.

THE UNITED STATES OF AMERICA, *District of Kentucky,* } ss:

On this 2nd day of July, 1900, before me personally appeared W. H. Wadsworth, one of the solicitors of the above-named plaintiff, who made solemn oath that he had read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

WM. T. HALE,
Notary Public, Jefferson County, Ky.

My commission expires Jan. 17, 1904.

13 Upon which bill there is sued the following processes:

The President of the United States of America to Charles C. McChord, James F. Dempsey, and John C. Wood, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall in the city of Louisville, on the first Monday in August next, to answer a bill in equity exhibited against you in our said court by Chesapeake & Ohio Railway Company, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of said court, in Louisville, this 5th day of July, A. D. 1900, and in the 125 year of our Independence.

Attest:

THOS. SPEED,
C. D. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendants are to enter their appearance in this suit in the clerk's office on or before the 6th day of August next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso.*

[SEAL.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

Upon which the marshal made the following returns:

Executed the within on Charles C. McChord, at his residence, in Springfield, Ky., by delivering to him a true copy of this spa. in cha'y this July 23, 1900.

A. D. JAMES,
U. S. Marshal,
By G. C. THOMPSON,
D. U. S. M.

Came to hand July the 6th, 1900.

A. D. JAMES,
U. D. Marshal,
By LAURENCE YONTS,
Deputy U. S. Marshal for the District of Ky.

Executed on James F. Dempsey by delivering to him a coppy hereof this July the 9th, 1900.

A. D. JAMES,
U. S. Marshal,
By LAURENCE YONTS,
Deputy U. S. Marshal for the District of Ky.

Received the within spa. in ch'y at Frankfort, Kentucky, this 12 day of July, A. D. 1900. Executed this 13th day of July, 1900, at Mt. Sterling, Kentucky, by delivering a true copy of the within spa. in ch'y to John C. Wood.

A. D. JAMES,
U. S. Marshal,
By C. McCARTY, *D. M.*

14 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, Complainant,
vs.
C. C. McCHORD, &c., Defendants. } Order.

JULY 9, 1900.

This day came the complainant, by Humphrey, Burnett & Humphrey, and produced herein notices, duly served upon the defendants, that the complainant would upon this day enter the motion for an interlocutory injunction in the terms of the prayer of its bill of complaint herein.

And thereupon came the defendants, by the Honorable Robert J. Breckinridge, attorney general of Kentucky, but nor waiving any objections to the jurisdiction of the court or other objections to the maintenance of conduct of this suit, but expressly reserving the same; and the complainant thereupon moved the court to grant to it an interlocutory injunction in accordance with the terms of the prayer of its bill of complaint herein, to which the defendants objected.

And thereupon, by consent, the said motion is assigned to the 13

day of July, 1900, at ten o'clock a. m., for hearing, it being agreed and so ordered that in the meantime the *status quo* shall be preserved and no effort made by the defendants to enforce against the complainant the terms of the act of the legislature set out in the bill of complaint and commonly known as the McChord law.

The notice above referred to is as follows:

15 Circuit Court of the United States in and for the District of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, Complainant,
vs.
CHARLES C. McCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants. } Notice.

GENTLEMEN: You are hereby notified that on Monday, July 9, 1900, at or about the hour of ten a. m., the complainant in the above-entitled cause will, before the United States circuit court, sitting at Louisville, Kentucky, move the court for a temporary injunction in accordance with the prayer of its bill of complaint herein this day filed, and a copy of which bill of complaint accompanies this notice, and is to be served upon Charles C. McChord, the chairman of the railroad commission of Kentucky.

Respectfully, WADSWORTH & COCHRAN,
For Comp't.

July 5, 1900.

To Hon. Charles C. McChord, Hon. James F. Dempsey, Hon. John C. Wood.

16 In the Circuit Court of the United States, District of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, Complainant,
—
CHARLES C. McCHORD, JAMES F. DEMPSEY, and JOHN C. WOOD, Defendants.

E. C. Turner, being duly sworn, states that he served the f-re-ing notice and the bill of complaint therein referred to upon the therein-named Charles C. McChord on the 5th day of July, 1900, by delivering to the said Charles C. McChord, at Springfield, Ky., at 7.45 p. m., on said date, a copy of the said notice and a copy of the said bill of complaint, and that he served the said notice upon the therein-named James F. Dempsey on July 6th, 1900, by delivering to him a copy of said notice at Louisville, Ky., at 9.50 a. m. on said date.

And Thos B. Harrison, Jr., being duly sworn, states that he served the foregoing notice upon the therein-names John C. Wood on July 5th, 1900, by delivering a copy of said notice to said John C. Wood, at Mt. Sterling, Ky., at 9.45 p. m. on said date.

E. C. TURNER.
THOS B. HARRISON, JR.

Subscribed and sworn to before me by E. C. Turner and Thos B. Harrison, Jr., respectfully, this 6th day of July, 1900. My commission expires January 8th, 1903.

G. W. B. OLMSTEAD,
[SEAL.] *Notar- Public, Jefferson Co., Ky.*

17 And on the 13th day of July, 1900, came the complainant, by Wadsworth & Cochran, its counsel.

Came also the defendants, by Louis McQuown and D. W. Baird, their counsel.

The complainant, by said counsel, filed an amended bill of complaint herein.

Came again the defendants, by their said counsel, and filed their demurrer to the bill and amended bill of complaint herein.

The complainant's motion heretofore entered herein for an interlocutory injunction coming on to be heard and having been argued by counsel, and the court, not being advised thereof, takes time.

The amended bill above referred to is as follows:

18 In the Circuit Court of the United States, District of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff, vs. CHARLES C. MCCHORD, JAMES F. DEMPSEY, and JOHN C. WOOD, Defendants.	6816.	Amended Bill.

And now comes the plaintiff and, with leave of the court first had and obtained, amends *his* bill of complaint herein as follows:

It states by way of amendment of the fourth paragraph of its original bill that its rates are just and reasonable, and the amount received by it from business done by it solely within the State of Kentucky in the transportation of freight and passengers entirely within said State has not been sufficient for many years to give to it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skilful manner. It states further that the amount received by it from its entire business within said State, or both interstate and intrastate traffic, has not been sufficient for many years for that purpose.

And it states further, by way of an additional paragraph to be numbered eighth, that the said act of March, 1900, relates to all freight and passenger rates charged, collected, or received by railroad companies in the Commonwealth of Kentucky, and is not restricted to rates actually charged, collected, and received within the Commonwealth of Kentucky for transportation commencing and ending within the said State, and therefore by its terms is an express and direct interference with and regulation of commerce among the States, inasmuch as by far the greatest part of the freight and passenger rates charged, collected, or received by this plaintiff

within the Commonwealth of Kentucky are interstate rates charged or collected and received within said State for the transportation of passengers and freight between points in other States and points in this State, and therefore the said act is in conflict with paragraph 3 of section 8 of article 1 of the Constitution of the
19 United States, which gives to the Congress of the United States exclusive power to regulate commerce among the States, and which power has been exercised by Congress by an act of February 4th, 1887, entitled "An act to regulate commerce among the States," and by the acts amendatory thereof, and that said act of March, 1900, is therefore null and void. Wherefore it prays as in its original bill.

WADSWORTH & COCHRAN,
Solicitors for Plaintiff.

THE UNITED STATES OF AMERICA, *District of Kentucky*, } *ss:*

On this the 13th day of July, 1900, before me personally appeared W. H. Wadsworth, one of the solicitors of the above-named plaintiff, who made solemn oath that he had read the foregoing amended bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

THOS. SPEED, *Clerk.*

The demurrer above referred to is as follows:

20 Circuit Court of the United States, in the District of Kentucky.

CHESAPEAKE & OHIO RAILWAY Company, Complainant, *vs.* CHARLES C. MCCHORD, JAMES F. Dempsey, John C. Wood, Defendants. } The Demurrer of Charles C. McChord, James F. Dempsey, and John C. Wood.

These defendants, Charles C. McChord, James F. Dempsey, and John C. Wood, jointly and severally, not confessing all nor any of the matters in the bill of complaint contained to be true as therein set forth, do demur to said bill for that the same does not state such a case nor contain any matter of equity entitling the complainant to any relief against these defendants or any of them; that this court is without jurisdiction to proceed, hear, or determine the matters set forth in said bill; that the complainant has a full and adequate remedy at law.

Wherefore they pray the judgment of the court whether they shall

be compelled to further answer said bill, and further pray to be dismissed with their costs.

ROB'T J. BRECKINRIDGE, JR.,
DAVID W. BAIRD,
AARON KOHN,
ZACK PHELPS,
LOUIS McQOUWN, *Counsel for Def'ts.*

I, Louis McQouwn, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is, in my opinion, well founded in law.

LOUIS McQOUWN.

UNITED STATES OF AMERICA, }
District of Kentucky. }

I, Charles C. McChord, one of the defendants in the above cause, being duly sworn, do say that the foregoing demurrer to the bill of complaint is not interposed for purposes of delay.

CHAS. C. McCHORD.

Subscribed and sworn to before me by Charles C. McChord this 13th day of July, 1900.
My com. expires Jan. 12, 1904.

DAVID W. BAIRD,
N. P., J. C., Ky.

21 And on the 16th day of July, 1900, came again the complainant, The Chesapeake & Ohio Railway, by Wadswort and Cochran, counsel, and came also the defendants herein, by Louis McQuown and D. W. Baird, counsel, and the court, being advised of the motion heretofore entered herein to grant to the complainant an interlocutory injunction in accordance with the terms of the prayer of the bill of complaint herein, delivered an opinion in writing, which is filed and ordered to be made a part of the record, and in consideration thereof it is adjudged, ordered, and decreed as follows:

That the defendants, C. C. McChord, J. F. Dempsey, and John C. Wood, be, and they are hereby, enjoined and restrained until the further order of the court herein from entertaining any complaint against complainant, or fixing any rate, toll, or compensation which the complainant, may charge, collect, or receive, or from entering any such rate, toll, or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent, or employé of the complainant, or from taking any action whatever against or in relation to complainant under said act of March 10th, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of en-

forcing the provisions of this act and penalties for the violation of its provisions," approved on the 10th day of March, 1900.

This order shall take effect upon the complainant's execution of a bond, with good security, to be approved by the clerk, in the penal sum of $1,000, to indemnify the defendants herein against all loss that may result from the issue of the injunction hereby ordered.

And on the 25th day of July, 1900, the following decree was entered :

22 Circuit Court of the United States, Sixth Circuit and District of Kentucky.

JULY 25, 1900.

CHESAPEAKE & OHIO RAILWAY COMPANY, Complainant,
vs.
CHAS. C. MCCHORD, &c., Defendants.

Final Decree.

And now, on this day, came again the complainant, The Chesapeake & Ohio Railway Company, by Wadsworth & Cochran, counsel, and came the defendants, Chas. C. McChord, J. F. Dempsey, and John C. Wood, by Robert J. Breckinridge, attorney general of Kentucky; D. W. Baird and Louis McQuown, counsel, and on motion of the said defendants, complainant not objecting thereto, the demurrer to the whole bill heretofore filed herein by the said defendants by consent of all parties was brought on for hearing, and having been argued by counsel and the court, being advised, considered the said bill to be sufficient and doth adjudge and order that the demurrer thereto be, and the same is, accordingly overruled.

And thereupon the court offered to give and assign time to the said defendants to answer the said bill; but the said defendants, by counsel, declined to answer herein at all and elected to stand by their demurrer.

And thereupon this cause, by consent in open court of all parties, presently came on for hearing in chief, and all parties submitting this cause for final decree, the court doth order that the said bill of complaint be taken as confessed against the said defendants, and doth further adjudge, order, and decree that the injunction
23 heretofore granted in this cause to restrain the said defendants, Chas. C. McChord, J. F. Dempsey, and John C. Wood, from entertaining any complaint against complainant, or giving any notice to or conducting any hearing against complainant, or fixing any rates, toll, or compensation which complainant may charge, collect, or receive, or from entering any such rate, toll, or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent, or employé of the complainant, or from taking any action whatever against or in relation to the complainant under said act of March 10, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agants, or em-

ployés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribe the manner of enforcing the provisions of this act and penalties for the violation of its provisions," approved on the 10th day of March, 1900, be, and it is hereby, made perpetual, as well *as* to said named defendants as to their successors in office of the railroad commission of Kentucky and their agents and servants.

And the court doth further order that the said defendants shall pay the costs of the complainant herein incurred.

The said defendants pray an appeal from the foregoing decree to the Supreme Court of the United States, which is accordingly granted upon the execution by them of a bond, with surety, to be approved by the court, in the penal sum of $500, conditioned according to law; and thereupon said defendants presented a bond with David W. Baird as surety thereon, which is approved by the court and ordered to be filed; and then came the complainant and waived service of citation upon said appeal and consented that no citation thereon should be issued.

24 The petition for appeal above referred to is as follows:

Circuit Court of the United States in and for the District of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

Petition on Appeal, with Allowance of Appeal.

To the Honorable Walter Evans, district judge and one of the judges of the above-named court, presiding therein:

The above-named defendants and appellants, Charles C. McChord, James F. Dempsey, and John C. Wood, in the above-entitled cause, conceiving themselves aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause under date of July 25, 1900, wherein and whereby, among other things, it was and is ordered and decreed that these defendants and appellants be perpetually enjoined from proceeding under a statute of the State of Kentucky approved March 10, 1900, to fix any rate against the complainant and appellee as directed and authorized by said statute, do hereby appeal to the Supreme Court of the United States from said order and decree for the reasons set forth in the assignment of errors, which is filed herewith, and they pray that this their petition for their said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which

said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated July 25, 1900.

KOHN & BAIRD,
R. J. BRECKINRIDGE,
ZACK PHELPS, &
LEWIS McQUOWN,
Solicitors for Defendants and Appellants.

Order.

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed and the bond is fixed at $500.00; and thereupon came the counsel for the defendants and appellants in this case and presented their appeal bond in the sum of $500.00, which is approved.

Done in open court this July 25, 1900.

——— ———,
District Judge and One of the Judges of said United States Circuit Court, Presiding Therein.

The assignment of errors above referred to is as follows:

25 Circuit Court of the United States in and for the District of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, Complainant,
vs.
CHARLES C. McCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

Come the defendants, Charles C. McChord, James F. Dempsey, and John C. Wood, and file the following assignment of errors upon which they and each of them will rely upon their appeal from the decree made by this honorable court on the 25th day of July, 1900, in the above-entitled cause:

1.

That the United States circuit court in and for the district of Kentucky erred in overruling the demurrer interposed by these defendants and appellants to the original bill filed in said cause.

2.

That the said court erred in rendering judgment against these defendants and appellants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the facts, as stated in the bill of complaint in said cause.

3.

That the said court erred in rendering a perpetual order of injunction against these defendants and appellants.

4.

That the said court erred in holding that it had jurisdiction of these defendants and appellants upon the subject-matter set forth in the bill of complaint, and before these defendants and appellants had proceeded under said bill to make or establish any rates against the complainant and appellee.

5.

That the said court erred in holding that under the statute of the State of Kentucky complained of these defendants and appellants act as a judicial body or are delegated judicial powers, contrary to the constitution of the State of Kentucky.

26

6.

That the said court erred in holding that the said statute complained of deprives the complainant and appellee of its property without due process of law or denies to the complainant and appellee the equal protection of the law, as guaranteed by the fourteenth amendment of the Constitution of the United States.

7.

That the said court erred in holding that the said statute complained of attempts to regulate interstate commerce and is in violation of article I, § 8, of the Constitution of the United States.

8.

That the said court erred in holding that the said statute complained of is void and unconstitutional because it does not provide a judicial hearing for the complainant and appellee with reference to the rates fixed thereunder or after said rates shall have been fixed.

9.

That the said court erred in holding that the said statute complained of is void because it does not provide that the rates which shall be fixed thereunder shall apply to all railroads in the State of Kentucky, and that because of said failure the said statute denies to the complainant and appellee the equal protection of the law.

Wherefore the said defendants and appellants on appeal pray that the judgment of said court be reversed.

KOHN & BAIRD,
R. J. BRECKINRIDGE,
ZACK PHELPS, &
LEWIS McQUOWN,
Counsel for Defendants.

The appeal bond above referred to is as follows:

27 Circuit Court of the United States, District of Kentucky.

CHESAPEAKE & OHIO RAILWAY
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. WOOD.

Know all men by these presents that we, C. C. McChord, J. F. Dempsey, John C. Wood, and David W. Baird, are held and firmly bound unto Chesapeake & Ohio Railway in the sum of five hundred dollars, to be paid to the said Chesapeake & Ohio Railway, executors or admininistrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 25 day of July, A. D. 1900.

Whereas the above-named C. C. McChord, J. F. Dempsey, and John C. Wood hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named C. C. McChord, J. F. Dempsey, and John C. Wood shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. C. McCHORD. [L. S.]
J. F. DEMPSEY. [L. S.]
JOHN C. WOOD, [L. S.]
By LOUIS M. McQUOWN, *Att'y.*
DAVID W. BAIRD. [L. S.]

Sealed and delivered in presence of—
THOS. SPEED, *Clerk.*

28 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 27 pages contain a true and correct transcript of the record and proceedings in the case of Chesapeake & Ohio Railway Company *vs.* C. C. McChord *et al.*, No. 6816, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 2 day of August, A. D. 1900.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
Deputy Clerk.

Endorsed on cover: File No., 17,883. Kentucky C. C. U. S. Term No., 398. Charles C. McChord, James F. Dempsey, and John C. Wood, appellants, *vs.* The Chesapeake & Ohio Railway Company. Filed August 21st, 1900.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 189 144.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

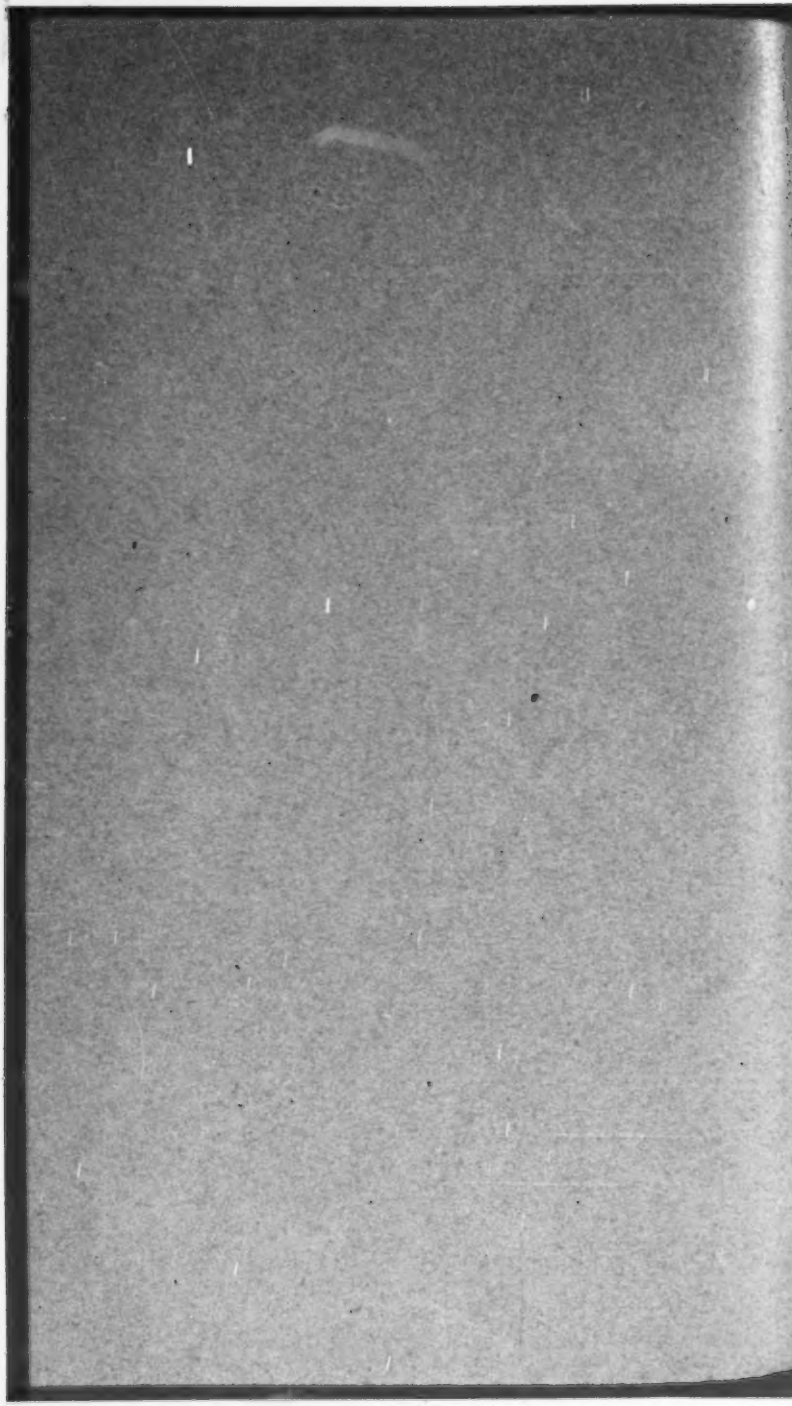
vs.

THE SOUTHERN RAILWAY COMPANY IN KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 21, 1900.

(17,884.)



(17,884.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 399.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

vs.

THE SOUTHERN RAILWAY COMPANY IN KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 22, 1900.

1 Proceedings of the circuit court of the United States for the district of Kentucky at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 19th, A. D. 1900.

Present: Hon. Walter Evans, sitting as circuit judge.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
C. C. MCCHORD, J. F. DEMPSEY, and JOHN C. WOOD, Defendants. } No. 6817.

Be it remembered that heretofore, to wit, on the 5th day of July, A. D. 1900, came the complainant in the above-entitled cause and filed its bill of complaint herein against the defendants above named; which said bill of complaint is as follows:

2 Circuit Court of the United States in and for the District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

To the honorable the judges of the circuit court of the United States on and for the district of Kentucky:

The Southern Railway Company in Kentucky, a corporation created, organized, and existing under and by virtue of the law- of the State of Kentucky and having its principal place of business in the city of Louisville, in said State, brings this its bill of complaint against Charles C. McChord, of Springfield, Washington county, Kentucky; James F. Dempsey, of Madisonville, Hopkins county, Kentucky, and John C. Wood, of Mount Sterling, Montgomery county, Kentucky, each of whom is a citizen of the State of Kentucky and an inhabotant of the district of Kentucky; and thereupon your orator complains and says that the amount in controversy herein far exceeds the sum and value of ten thousand dollars, exclusive of interest and costs.

1. That your orator conducts and operates as a common carrier of freight and passengers more than 122 miles of railroad in the State of Kentucky; that over its said line it carries a very large traffic, both passengers and freight, and both State and interstate, and about 80 per cent. of the traffic passing over its lines in the State of Kentucky is interstate traffic in the strictest sense, and much of the remainder is virtually interstate traffic, the rates upon which have a direct and far-reaching influence upon commerce among the States.

3 2. That the defendants herein are holding and exercising the offices of railroad commissioners of the State of Kentucky,

having been duly elected thereto and qualified therefor, and as such constitute the railroad commission of said State, and as such claim and unless restrained by the orders of this court will exercise the right to fix rates for the transportation of passengers and property over the various lines of your orator's railroad by virture of an alleged act of the General Assembly of the Commonwealth of Kentucky, which it is claimed became a law on the — day of March, 1900, and took effect on the 12th day of June, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto and prescribing the manner of enforcing the provisions of this act and penalties for the violations of its provisions." The said act consists of five sections in the following words, to wit:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission, to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll
4 or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent, or employee thereof, charge, collect or receive a greater or higher rate, toll, or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less

than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum, not less than two thousand dollars nor more than five thousand dollars.

SEC. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending and the circuit court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

SEC. 3. Prosecutions under this act shall be by indictment.

SEC. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

SEC. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

5 By said act said railroad commission is authorized and required, when complaint is made or when it receives information or has reason to believe that any railroad company or corporation is charging, collecting, or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, to hear and determine the matter as speedily as possible, and before doing so to mail not less than ten days beforehand a notice to any officer, agent, or employé of said company or corporation—for example, to a brakeman or section hand—stating the time and place of the hearing and the nature of the matter to be investigated.

Said railroad commission is further authorized and required by said act, if upon such investigation made upon such notice it shall determine that said company or corporation is or has been guilty of extortion in the particulars charged, to make and fix, without any notice and without any investigation, what it shall deem to be a just and reasonable rate, toll, or compensation which said company or corporation may thereafter charge, and said rate, toll, or compensation so fixed shall be in full force and effect at the expiration of ten days after the said commission shall have mailed a copy of the order fixing the same to any officer, agent, or employé of the said company or corporation affected thereby—for example, as above stated, such notice may be mailed to a brakeman or section hand—and at all times thereafter said commission may, at any time and without any notice and without any investigation, modify or change the rates thus fixed by it; and if said company or corporation or any of its officers, agents, or employés shall thereafter charge, collect, or receive a greater rate than that made and fixed by said commission, as above stated, said company or corporation and said officers, agents, and employés are each by said act made guilty of extortion and, upon conviction, are each to be fined for the first offense not less than five hundred dollars nor more than one thousand dollars,

and upon a second conviction in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars.

6 Thus, under said act, said railroad commission is authorized to fix the rates of your orator and all other railroad companies or corporations without any notice and without any investigation from or by it. The rates so fixed are to go into full force and effect simply by the lapse of ten days from the date of the mailing of the copy of the order fixing the same to any officer, agent, or employé of the railroad company or corporation, and unless the railroad company or corporation affected thereby straightway complies with said rate, although such rate may be a palpable invasion of such company's or corporation's constitutional rights, such corporation will be subject to the excessive fines fixed in said act with respect to each shipment passing over its road to which said commission desires said rates so fixed to apply, and every officer, agent, or employé of said company or corporation either charging, collecting, or receiving the rate fixed and charged by said company or corporation for each of such shipments in question, although the said corporation may have full right and power under the Constitution of the United States to charge such rate, will likewise be subjected to said excessive fines.

7 3. It is the duty of said railroad commission, composed, as aforesaid, of the defendants herein, to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State. To this end they are authorized and required to inquire into the management of affairs of railroad companies; to inspect and examine their tracks, bridges, tunnels, and other structures; to supervise facilities at stations, and in many other ways to exercise administrative functions with respect to the railroads of said State. The constitution of said State divides the powers of its government into three distinct departments, each to be confined to a separate body of magistracy—those which are legislative to one, those which are executive to another, and those which are judicial to another—and declares that no person or collection of persons being of one of those departments shall exercise any power properly belonging to either of the others, except in the instances expressly directed and permitted in said constitution. By said constitution the judicial power of said State is vested in the senate, when sitting as a court of impeachment, and one supreme court, to be styled the court of appeals, and the courts established by said constitution, to wit, circuit courts, quarterly courts, county courts, justices' courts, police courts, and fiscal courts. The said railroad commission is not established as a court by said constitution and is not expressly directed or permitted by said constitution to exercise any judicial powers; on the contrary, its powers are essentially and purely of an administrative character, and it essentially belongs to the executive department of the State government. The laws of said State not only fail to confer

upon it judicial functions or powers, but prohibit the con-
8 ferring of any such powers upon it, and by reason of the administrative functions with respect to the conduct and regulation of railroads which said commission is required and authorized to perform it is rendered essentially unfit to exercise judicial functions.

4. That at present your orator, like all other common carriers in the State of Kentucky, is authorized and does fix the rates for the transportation by it of passengers and freight, subject to the requirement of law, which operates alike upon all common carriers; that such rates shall be just and reasonable, and your orator is now entitled, as are all other common carriers, to a judicial determination by the duly established courts of the State of any question as to the justice or reasonableness of all or any of such rates, which the act aforesaid denies to it. Your orator avers that its rates are just and reasonable and have not been sufficient for many years to give to it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skilful manner. In addition to fixing and charging rates subject to and in conformity with the requirements of law applicable to all common carriers that their rates shall be just and reasonable, your orator is subject to and complies with all the requirements of the laws of the State of Kentucky prohibiting unjust discrimination between individuals and localities in the matter of rates, which laws do not apply to all common carriers, but are unreasonably restricted so as to apply merely to companies or corporations which operate railroads; and, further, your orator is forced to and does recognize the requirements of competition, which constantly tend to reduce rates and which affect not merely rates to or from points known as competitive points, but in a greater or less degree, all rates between all points, so as to prevent any rates becoming or remaining unreasonably high.

5. That while all other common carriers, whether operating railroads or not, are subject only to the requirement that their rates are just and reasonable, and in case of controversy are entitled to have the judgment of the courts upon that question, the said act here-
9 inbefore referred to singles out railroad companies or corporations and denies them the equal protection of the laws applying to all other common carriers, and deprives said railroad companies or corporations of any opportunity to have a judicial determination of the reasonableness of their rates when the same are called in question, and substitutes therefor the determination of said railroad commission, which is not and cannot be a court and which does not afford and cannot afford a judicial hearing or determination of questions brought before it; and whereas all other common carriers in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or consequence attaches to such judicial determination, yet railroad companies or corporations are to be subjected, in the absence of any judicial determination

as to whether their rates are reasonable or otherwise, and simply upon the determination of said non-judicial tribunal, the railroad commission, that such rates are unreasonable, to the penalty of having the power to make their rates taken out of their hands and vested exclusively in said railroad commission, which commission is then without any hearing, judicial or otherwise, to fix such rates as it may choose, and is thereafter without any notice and without any hearing, judicial or otherwise, to have the right at its pleasure to modify the rates so fixed by it, and if said railroad companies or corporations fail to charge the rates thus fixed for them by this unjust and unconstitutional procedure they will be subjected for every shipment passing over their lines to which said railroad commission may desire said rates so fixed by it to apply to the prosecutions, fines, and penalties imposed in said act.

6. Your orator submits that under the Constitution of the United States it is entitled to charge reasonable rates for the use of its property, and that it cannot be compelled to charge rates fixed by the railroad commission of Kentucky in the absence of a judicial investigation and determination that the rates so fixed are just and reasonable; that the said act makes no provision for any investigation or determination even by the railroad commission that the rates fixed by it are just and reasonable, and the said commission may fix such rates without any notice to the railroad companies or corporations to which said act applies as to what said commission proposes to do and without any investigation of the questions involved, and may thereafter change or modify said rates without any notice or investigation; but that even if said commission should choose to give notice and investigate such questions, such investigation and resulting determination would not satisfy your orator's constitutional rights to a judicial determination, because said commission is not a court, nor is it clothed with judicial functions, but, on the contrary, it is an administrative tribunal, which, under the law, cannot exercise judicial functions, and which, by reason of the functions it does exercise, is in its nature incapable of affording the judicial investigation to which your orator is entitled, and by said act your orator is denied the privilege and right to have it judicially determined by a court of competent jurisdiction whether the rates fixed and charged by it are just and reasonable, and whether the rates fixed by said commission amount to a confiscation and spoliation of its property. If, therefore, defendants be permitted to proceed under said act, your orator will be compelled to charge the rates fixed by them without any opportunity for a judicial investigation and determination as to their reasonableness, and it will then be deprived of the lawful use of its property and of substance and effect of the property itself without due process of law, in violation of section 1 of article 14 of the amendment- to the Constitution of the United States; and whereas all other persons in the State of Kentucky but railroad corporations are permitted to receive reasonable profits from their invested capital, your orator and other railroad companies or corporations will by said act be deprived of the equal protection of the laws.

11 7. Your orator further states that the said act of March, 1900, relates to all freight and passenger rates charged, collected, or received by railroad companies in the Commonwealth of Kentucky, and is not restricted to the rates actually charged, collected, and received, within the Commonwealth of Kentucky, for transportation commencing and ending within the said State, and therefore by its terms is an express and direct interference with and regulation of commerce among the States; that your orator's line of railroad is largely used in the transportation of interstate commerce, your orator's line forming, with other lines in the State of Kentucky and outside of the State of Kentucky, through lines of travel and transportation from many States of the Union, and your orator receiving and charging for such through transportation a part of the through rate. The said through transportation consists not only of transportation from points in Kentucky to points outside of Kentucky, but from points outside of Kentucky to other points outside of Kentucky. Your orator is thus engaged in interstate traffic, and the said act, in that, without discrimination, it authorizes the fixing of through rates or the proportion of through rates, as well as strictly infrastate rates, is unconstitutional and void because it is in conflict with paragraph 3 of section 8 of article 1 of the Constitution of the United States, which gives to the Congress of the United States exclusive power to regulate commerce among the States, which power has been exercised by Congress by an act of February 4, 1887, entitled "An act to regulate commerce among the States," and acts amendatory thereof.

And so it is that said act of March, 1900, is for this reason also null and void.

12 8. That the defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroad in the State of Kentucky for the purpose of considering whether or not said rates in their judgment are unreasonable and extortionate and of fixing rates to be charged by it, if they so determine, and it is their intention and purpose to hear complaints under said act, and, upon such complaints being made, to determine whether the rates complained of are unreasonable and extortionate, and, if they so determine, to fix rates to be charged by it instead of those complained of, and the defendants are giving it out in speeches and interviews that they intend so to proceed, and unless restrained by the order of this court they will proceed to act under said act, hear and determine complaints thereunder, and fix such rates as they think your orator should charge, and will thereafter at pleasure modify the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the State of Kentucky for failure to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same

time all your orator's officers and agents and servants, though perfectly innocent of any offense and though merely assisting your orator to maintain its constitutional rights, will be indicated, prosecuted, and heavily fined, to the great demoralization of the public service which your orator is bound to render, and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator will be deprived of its property without due process of law, denied the equal protection of the law, subjected to great and irreparable wrong and injury and to a vast multiplicity of prosecutions in the courts of the State.

13 Forasmuch as your orator can have no adequate relief except in this court, and to the end that the defendants may, if they can, show why your orator shall not have the relief herein prayed, and that they answer this bill according to the course and practice of the court, but not under oath, the answer of each of them under oath being hereby expressly waived, your orator prays that the said act of March, 1900, be decreed and be declared to be in contravention of the Constitution of the United States, and therefore null and void, and that until the further order of the court said defendants be enjoined from taking any action whatever against or in relation to complainant under said act; that said injunction may be made perpetual upon final hearing, and as irreparable injury to your orator may ensue if defendants should take any action against or in relation to your orator under said act before the motion for a preliminary injunction can be heard, your orator prays that an order be granted restraining defendants from doing the acts herein sought to be enjoined, and your orator prays for such other and further relief as in equity it may be entitled to, and further prays that your honors also grant unto your orators a writ of subpœna of the United States of America, directed to the said C. C. McChord, J. F. Dempsey, and John C. Wood, commanding them on a day certain to appear and answer this bill and to abide and perform such order and decree as to your honors shall seem meet and equitable; and your orator will ever pray, etc.

HUMPHREY, BURNETT & HUMPHREY,
Solicitors for Complainant.

THE UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

On this 5th day of July, 1900, before me personally appeared H. B. Spencer, superintendent of the above-named plaintiff, who made solemn oath that he had read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

R. A. BATMAN,
N. P. J. Co., Ky.

My commission expires at the end of the next session of the senate.

14 Upon which bill there issued the following processes:

The President of the United States of America to Charles C. McChord, James F. Dempsey, and John C. Wood, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in August next, to answer a bill in equity exhibited against you in our said court by Southern Railway Co. in Kentucky, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court, hereto affixed, this 5th day of July, A. D. 1900, and in the 125 year of our Independence.

Attest:

THOS. SPEED,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendants are to enter their appearance in the suit in the clerk's office on or before the 6th day of August next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
His Deputy.

Upon which the marshal made the following returns:

Executed the within on Charles C. McChord, at his residence, in Springfield, Ky., by delivering to him a true copy of this spa. in ch'y this July 23, 1900.

A. D. JAMES, *U. S. Marshal,*
By G. C. THOMPSON, *D. U. S. M.*

Came to hand July the 6th, 1900.

A. D. JAMES, *U. S. Marshal*
By LAURENCE YONTS,
Deputy U. S. Marshal for District of Ky.

Executed the within on James F. Dempsey by delivering to him a copy hereof this July the 9th, 1900.

A. D. JAMES,
U. S. Marshal,
By LAURENCE YONTS,
Deputy U. S. Marshal.

Received the within spa. in ch'y, at Frankfort, Kentucky, this 18 day of June, A. D. 1900. Executed this 13th day of July, 1900, at Mt. Sterling, Kentucky, by delivering a true copy of the within spa. in ch'y to John C. Wood.

A. D. JAMES,
U. S. Marshal,
By C. McCARTY, *D. M.*

15 Circuit Court of the United States, Sixth Circuit, District of Kentucky.

JULY 9, 1900.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
C. C. MCCHORD, &c., Defendants. } Order.

This day came the complainant, by Humphrey, Burnet & Humphrey, and produced herein notices, duly served upon the defendants, that the complainant would upon this day enter the motion for an interlocutory injunction in the terms of the prayer of its bill of complaint herein.

And thereupon came the defendants, by the Honorable Robert J. Breckinridge, attorney general of Kentucky, but not waiving any objections to the jurisdiction of the court or other objections to the maintenance or conduct of this suit, but expressly reserving the same; and the complainant thereupon moved the court to grant to it an interlocutory injunction in accordance with the *the* terms of the prayer of its bill of complaint herein; to which the defendants objected.

And thereupon, by consent, the said motion is assigned to the 13 day of July, 1900, at ten o'clock a. m., for hearing, it being agreed and so ordered that in the meantime the *status quo* shall be preserved and no effort made by the defendants to enforce against the complainant the terms of the act of the legislature set out in the bill of complaint and commonly known as the McChord law.

The notice above referred to is as follows:

16 Circuit Court of the United States in and for the District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainants,
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants. } Notice.

GENTLEMEN: You are hereby notified that on Monday, July 9, 1900, at or about the hour of ten a. m., the complainant in the above-entitled cause will, before the United States circuit court, sitting at Louisville, Kentucky, move the court for a temporary injunction in accordance with the prayer of its bill of complaint herein this day filed, and a copy of which bill of complaint accompanies this notice and is to be served upon Charles C. McChord, the chairman of the railroad commission of Kentucky.

July 5, 1900.

Respectfully,
HUMPHREY, BURNETT & HUMPHREY, *For Comp't.*

To Hon. Charles C. McChord, Hon. James F. Dempsey, Hon. John C. Wood.

17 In the Circuit Court of the United States, District of Kentucky.

SOUTHERN RAILWAY COMPANY OF KENTUCKY, Complainant,
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, and JOHN C. WOOD, Defendants.

E. C. Turner, being duly sworn, states that he served the fore-ing notice and the bill of complaint therein referred to upon the therein-named Charles C. McChord on the 5th day of July, 1900, by delivering to the said Charles C. McChord, at Springfield, Ky., at 7.45 p. m., on said date, a copy of the said notice and a copy of the said bill of complaint, and that he served the said notice upon the therein-named James F. Dempsey on July 6th, 1900, by delivering to him a copy of said notice at Louisville, Ky., at 9.50 a. m. on said date.

And Thos. B. Harrison, Jr., being duly sworn, states that he served the foregoing notice upon the therein-names John C. Wood on July 5th, 1900, by delivering a copy of said notice to said John C. Wood, at Mt. Sterling, Ky., at 9.45 p. m. on said date.

E. C. TURNER.
THOS. B. HARRISON, JR.

Subscribed and sworn to before me by E. C. Turner and Thos. B. Harrison, Jr., respect*ful*ly, this 6th day of July, 1900. My commission expires January 8th, 1903.

[SEAL.]

G. W. B. OLMSTEAD,
Notar- Public, Jefferson Co., Ky.

18 And on the 13th day of July, 1900, came the complainant, by Humphrey, Burnett & Humphrey, its counsel.

Came also the defendants, by Louis McQuown and D. W. Baird, their counsel, and filed their demurrer to the bill of complaint herein.

The complainant's motion heretofore entered herein for an interlocutory injunction coming on to be heard and having been argued by counsel, and the court, not being advised thereof, takes time.

The demurrer above referred to is as follows:

19 Circuit Court of the United States in the District of Kentucky.

SOUTHERN RAILWAY IN KENTUCKY, Complainant,
vs.
CHARLES C. MCCHORD, JAMES F. Dempsey, John C. Wood, Defendants.

The Demurrer of Charles C. McChord, James F. Dempsey, and John C. Wood.

These defendants, Charles C. McChord, James F. Dempsey, and John C. Wood, jointly and severally, not confessing all nor any of the matters in the bill of complaint contained to be true as therein

set forth, do demur to said bill for that the same does not state such a case nor contain any matter of equity entitling the complainant to any relief against these defendants or any of them; that this court is without jurisdiction to proceed, hear, or determine the matters set forth in said bill; that the complainant has a full and adequate remedy at law.

Wherefore they pray the judgment of the court whether they shall be compelled to further answer said bill, and further pray to be dismissed with their costs.

ROB'T J. BRECKINRIDGE, JR.,
DAVID W. BAIRD,
AARON KOHN,
ZACK PHELPS,
LOUIS McQOUWN.
Counsel for Def'ts.

I, Louis McQouwn, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is, in my opinion, well founded in law.

LOUIS McQOUWN.

UNITED STATES OF AMERICA, }
District of Kentucky. }

I, Charles C. McChord, one of the defendants in the above cause, being duly sworn, do say that the foregoing demurrer to the bill of complaint is not interposed for purposes of delay.

CHAS. C. McCHORD.

Subscribed and sworn to before me by Charles C. McChord this 13th day of July, 1900.

My com. expires Jan. 12, 1904.

DAVID W. BAIRD,
N. P., J. C., Ky.

20 And on the 16th day of July, 1900, came again the complainant, The Southern Railway Company in Kentucky, by Alex. P. Humphrey, counsel, and came also the defendants herein, by Lewis McQuown and D. W. Baird, counsel, and the court, being advised of the motion heretofore entered herein to grant to the complainant an interlocutory injunction in accordance with the terms of the prayer of the bill of complaint herein, delivered an opinion in writing, which is filed and ordered to be made a part of the record, and in consideration thereof it is adjudged, ordered, and decreed as follows: That the defendants, C. C. McChord, J. F. Dempsey, and John C. Wood, be, and they are hereby, enjoined and restrained until the further order of the court herein from entertaining any complaint against complainant, or giving any notice of or conducting any hearing against complainant, or fixing any rate, toll, or compensation which the complainant may charge, collect, or receive, or from entering any such rate, toll, or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer,

agent, or employé of the complainant, or from taking any action whatever against or in relation to complainant under said act of March 10th, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions," approved on the 10th day of March, 1900.

This order shall take effect upon the complainant's execution of a bond, with good security, to be approved by the clerk, in the penal sum of $1,000, to indemnify the defendants herein against all loss that may result from the issue of the injunction hereby ordered.

And on the 25th day of July, 1900, *came* the following decree was entered :

21 Circuit Court of the United States, Sixth Circuit and District of Kentucky.

JULY 25, 1900.

SOUTHERN RAILWAY COMPANY OF KENTUCKY, Complainant, vs. CHAS. C. MCCHORD, &c., Defendants. } Final Decree.

And now, on this day, came again the complainant, The Southern Railway Company in Kentucky, by Alex. P. Humphrey, counsel, and came the defendants, Chas. C. McChord, J. F. Dempsey, and John C. Wood, by Robert J. Breckinridge, attorney general of Kentucky; D. W. Baird and Louis McQuown, counsel, and on motion of the said defendants, complainant not objecting thereto, the demurrer to the whole bill heretofore filed herein by the said defendants by consent of all parties was brought on for hearing, and having been argued by counsel, and the court, being advised, considered the said bill to be sufficient and doth adjudge and order that the demurrer thereto be, and the same is, accordingly overr*lie*d.

And thereupon the court offered to give and assign time to the said defendants to answer the said bill; but the said defendants, by counsel, declined to answer herein at all and elected to stand by their demurrer.

And thereupon this cause, by consent in open court of all parties, presently came on for hearing in chief, and, all parties submitting this cause for final decree, the court doth order that the said bill of complaint be taken as confessed against the said defendants, and doth further adjudge, order, and decree that the injunction heretofore granted in this cause to restrain the said defendants,

22 Chas. C. McChord, J. F. Dempsey, and John C. Wood, from entertaining any complaint against complainant, or giving any notice to or conducting any hearing against complainant, or fixing any rates, toll, or compensation which complainant may

charge, collect, or receive, or from entering any such rate, toll, or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent, or employé of the complainant, or from taking any action whatever against or in relation to the complainant under said act of March 10, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, or employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribe the manner of enforcing the provisions of this act and penalties for the violation of its provisions," approved on the 10th day of March, 1900, be, and it is hereby, made perpetual, as well *as* to said named defendants as to their successors in office of the railroad commission of Kentucky and their agents and servants.

And the court doth further order that the said defendants shall pay the costs of the complainant herein incurred.

The said defendants pray an appeal from the foregoing decree to the Supreme Court of the United States, which is accordingly granted upon the execution by them of a bond, with surety, to be approved by the court, in the penal sum of $500, conditioned according to law; and thereupon said defendants presented a bond with David W. Baird as surety thereon, which is approved by the court and ordered to be filed; and then came the complainant and waived service of citation upon said appeal and consented that no citation thereon should be issued.

23 The petition for appeal above referred to is as follows:

Circuit Court of the United States in and for the District of Kentucky.

SOUTHERN RAILWAY IN KENTUCKY, Complainant,
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

Petition on Appeal, with Allowance of Appeal.

To the Hon. Walter Evans, district judge and one of the judges of the above-named court, presiding therein:

The above-named defendants and appellants, Charles C. McChord, James F. Dempsey, and John C. Wood, in the above-entitled cause, conceiving themselves aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause under date of July 25, 1900, wherein and whereby, among other things, it was and is ordered and decreed that these defendants and appellants be perpetually enjoined from proceeding under a statute of the State of Kentucky approved March 10, 1900, to fix any rate against the complainant and appellee as directed and authorized by said statute, do hereby appeal to the Supreme Court of the

United States from said order and decree for the reasons set forth in the assignment of errors, which is filed herewith, and they pray that this their petition for their said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated July 25, 1900.

KOHN & BAIRD,
R. J. BRECKINRIDGE,
ZACK PHELPS, &
LEWIS McQUOWN,
Solicitors for Defendants and Appellants.

Order.

The foregoing petition on appeal is granted and the claim of appeal therein made is allowed and the bond is fixed at $500.00; and thereupon came the counsel for the defendants and appellants in this case and presented their appeal bond in the sum of $500.00, which is approved.

Done in open court this July 25, 1900.

____ ____,
District Judge and One of the Judges of said United States Circuit Court, Presiding Therein.

The assignment of errors above referred to is as follows:

24 Circuit Court of the United States in and for the District of Kentucky.

SOUTHERN RAILWAY IN KENTUCKY, Complainant,
vs.
CHARLES C. McCHORD, JAMES F. DEMPSEY, JOHN C. WOOD, Defendants.

Come the defendants, Charles C. McChord, James F. Dempsey, and John C. Wood, and file the following assignment of errors upon which they and each of them will rely upon their appeal from the decree made by this honorable court on the 25th day of July, 1900, in the above-entitled cause:

1.

That the United States circuit court in and for the district of Kentucky erred in overruling the demurrer interposed by these defendants and appellants to the original bill filed in said cause.

2.

That the said court erred in rendering judgment against these defendants and appellants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the facts, as stated in the bill of complaint in said cause.

3.

That the said court erred in rendering a perpetual order of injunction against these defendants and appellants.

4.

That the said court erred in holding that it had jurisdiction of these defendants and appellants upon the subject-matter set forth in the bill of complaint, and before these defendants and appellants had proceeded under said bill to make or establish any rates against the complainant and appellee.

5.

That the said court erred in holding that under the statute of the State of Kentucky complained of these defendants and appellants act as a judicial body or are delegated judicial powers, contrary to the constitution of the State of Kentucky.

25 6.

That the said court erred in holding that the said statute complained of deprives the complainant and appellee of its property without due process of law or denies to the complainant and appellee the equal protection of the law, as guaranteed by the fourteenth amendment of the Constitution of the United States.

7.

That the said court erred in holding that the said statute complained of attempts to regulate interstate commerce and is in violation of article 1, § 8, of the Constitution of the United States.

8.

That the said court erred in holding that the said statute complained of is void and unconstitutional because it does not provide a judicial hearing for the complainant and appellee with reference to the rates to be fixed thereunder or after said rates shall have been fixed.

9.

That the said court erred in holding that the said statute complained of is void because it does not provide that the rates which shall be fixed thereunder shall apply to all railroads in the State of Kentucky, and that because of said failure the said statute denies to the complainant and appellee the equal protection of the law.

Wherefore the said defendants and appellants on appeal pray that the judgment of said court be reversed.

KOHN & BAIRD,
R. J. BRECKINRIDGE,
ZACK PHELPS, &
LEWIS McQUOWN,
Counsel for Defendants.

The appeal bond above referred to is as follows:

26 Circuit Court of the United States, District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY }
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. WOOD. }

Know all men by these presents that we, C. C. McChord, J. F. Dempsey, and John C. Wood, and David W. Baird, are held and firmly bound unto Southern Railway Company in Kentucky in the sum of five hundred dollars, to be paid to the said Southern Railway Company in Kentucky, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 25th day of July, A. D. 1900.

Whereas the above named C. C. McChord, J. F. Dempsey, and John C. Wood hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named C. C. McChord, J. F. Dempsey, and John C. Wood shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. C. McCHORD, [L. S.]
J. F. DEMPSEY, [L. S.]
JOHN C. WOOD,
By LOUIS McQUOWN, *Att'y.* [L. S.]
DAVID W. BAIRD. [L. S.]

Sealed and delivered in presence of—
THOS. SPEED, *Clerk.*

27 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 26 pages contain a true and correct transcript of the record and proceedings in the case of Southern Railway Company in Kentucky *vs.* C. C. McChord *et al.*, No. 6817, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 2nd day of August, A. D. 1900.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN,
Deputy Clerk.

Endorsed on cover: File No., 17,884. Kentucky C. C. U. S. Term No., 399. Charles C. McChord, James F. Dempsey, and John C. Wood, appellants, *vs.* The Southern Railway Company in Kentucky. Filed August 21st, 1900.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 145.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

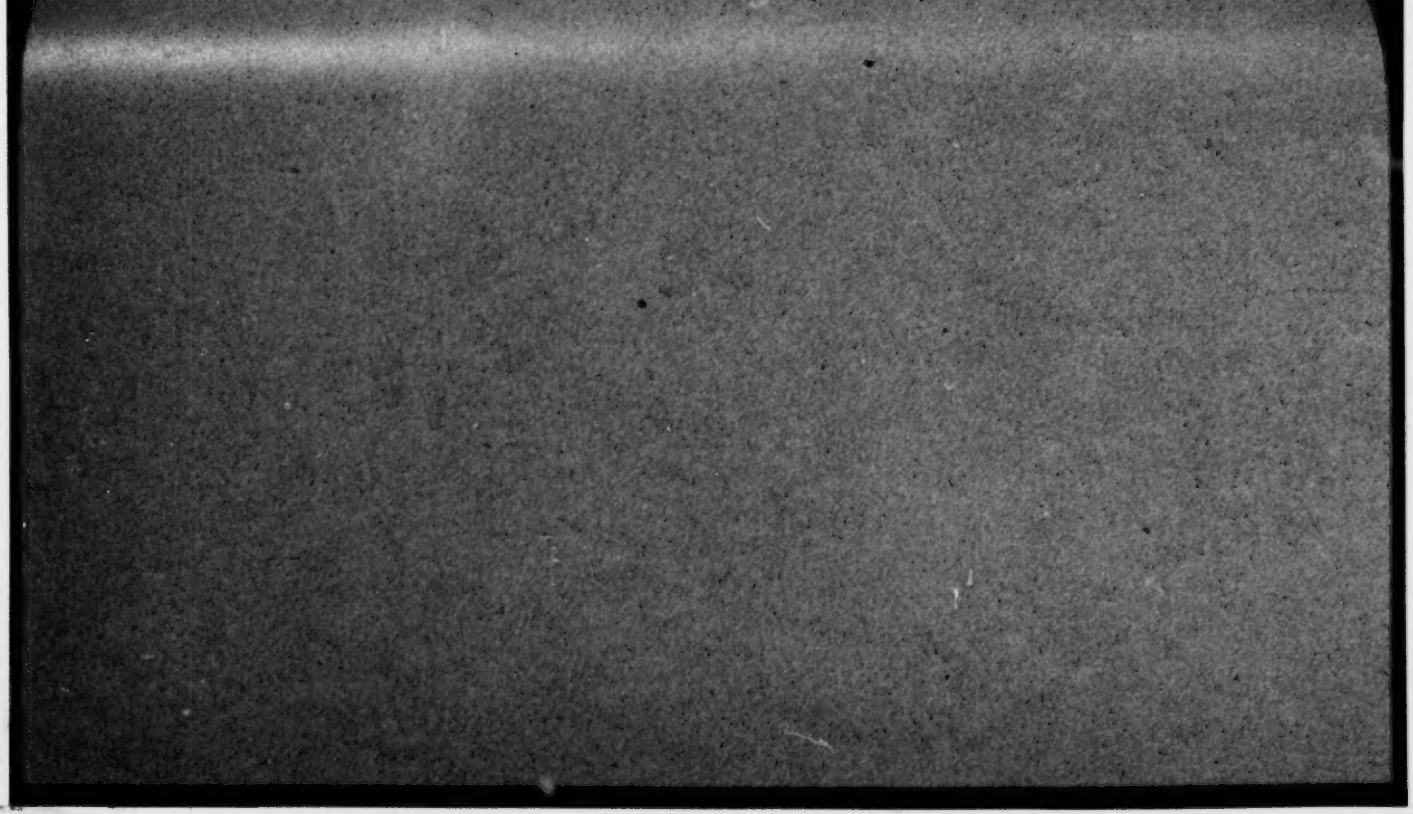
vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 21, 1900.

(17,885.)



(17,885.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 400.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 22, 1900.

1 UNITED STATES OF AMERICA, }
District of Kentucky, } ss:

At a stated term of the circuit court of the United States of America within and for the district of Kentucky, in the sixth judicial circuit of the United States of America, begun and held at Federal court hall, in the city of Covington, Kentucky, in said district, on the second Monday of May, being also the 14th day of that month, in the year of our Lord one thousand nine hundred, and of our Independence the 124th year—present, Hon. Walter Evans, sitting as circuit judge—among other proceedings had were the following, to wit:

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY Company, Complainants,
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. WOOD, Defendants.

Be it remembered that heretofore, to wit, on the 11th day of July, A. D. 1900, came the plaintiffs, by their attorneys, and filed in the clerk's office of said court their certain petition against the defendants herein. Said petition was and is in words and figures following, to wit:

2 UNITED STATES OF AMERICA, }
District of Kentucky. }

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC Railway Company
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. Wood. } Bill in Equity.

To the judges of the circuit court of the United States for the district of Kentucky:

The Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation organized under and pursuant to the laws of the State of Ohio and having its principal place of business in the city of Cincinnati, State of Ohio, brings this its bill of complaint against C. C. McChord, a resident of Springfield, Kentucky; J. F. Dempsey, a resident of Madisonville, Kentucky, and John C. Wood, a resident of Mt. Sterling, Kentucky; and thereupon your orator complains and says that it is a corporation organized under the laws of the State of Ohio and of no other State, and that the defendants are all of them citizens and residents of the State of Kentucky, and that the amount involved in this litigation exceeds the sum of two thousand ($2,000) dollars, exclusive of interest and costs.

1. Your orator says that by an act of the General Assembly of the State of Kentucky entitled An act to authorize the trustees of the Cin-

cinnati Southern railway to acquire the right of way and ex-
3 tend a line of railway through certain counties of this Common-
wealth," approved February 13, 1872, the trustee- of the Cincinnati Southern railway acquired the right of way through the State of Kentucky and constructed thereon a line of railway extending from the city of Cincinnati, Ohio, through the State of Kentucky to the city of Chattanooga, in the State of Tennessee; that by the terms of said act the said trustee- of the Cincinnati Southern railway were authorized and empowered to lease said line of railway to another railroad corporation for the purpose of operating the same; that by the provisions of said act the lessee to whom said road was leased was entitled to charge for transportation on said railway not exceeding 35 cents per 100 pounds on heavy articles, — cents per cubic foot on articles of measurement for every hundred miles, and 4 cents a mile for every passenger; that on the 11th day of October, A. D. 1881, the trustees of the Cincinnati Southern railway leased said line of railway to your orator, who since said date has been and is now in possession of said line of railway, and has been operating said railway as a common carrier of passengers and freight from the city of Cincinnati, Ohio, to the city of Chattanooga, Tennessee; that by and under the provisions of the said act your orator is permitted to charge for transportation over said line not exceeding 35 cents per 100 pounds on heavy articles, — cents per cubic foot on articles of measurement for every hundred miles, and 4 cents a mile for every passenger; that said railroad so
4 constructed and leased, as aforesaid, commences in the State of Ohio and passes through the State of Kentucky and through the State of Tennessee to Chattanooga, in the State of Tennessee; that but a part of said railroad, to wit, $197\frac{88}{100}$, miles, operated by your orator, as aforesaid, lies within the State of Kentucky, and that all of said railroad so constructed and operated by your orator is now held and operated by virtue of and under the faith of said grant from the Commonwealth of Kentucky to the said trustees of the Cincinnati Southern railway.

Your orator says that by reason of the premises there was and is a valid and subsisting contract between the Commonwealth of Kentucky and your orator, whereby your orator is permitted to charge within the State of Kentucky not exceeding the maximum rates hereinbefore set out upon the railroad operated by it within the State of Kentucky, and that the lease of your orator to operate said railroad was acquired by your orator upon the faith of said contract.

2. Defendants herein are holding and exercising the position of railroad commissioners in the State of Kentucky, having been duly elected and qualified therefor, and as such constitute the railroad commission of said State, and as such claim and unless restrained by the order of this court will exercise the right to fix rates for the transportation of passengers and property over the lines of your orator's railroad in the State of Kentucky by virtue of an alleged act of the General Assembly of the Commonwealth of Ken-
5 tucky, which it is claimed was approved on the — day of March, 1900, and took effect on the 12th day of June, 1900,

entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions." The said act consists of five sections in the following words, to wit:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the
6 complaint or matter to be investigated, and shall hear such statements, arguments or evidence, offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum not less
7 than two thousand dollars nor more than five thousand dollars.

SEC. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight owned or operated by said railroad, and the Franklin circuit court, shall

have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

SEC. 3. Prosecutions under this act shall be by indictment.

SEC. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

SEC. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

By said act said railroad commission is authorized and required, when complaint is made or when it receives information or has reason to believe that any railroad company or corporation, in its judg-
8 ment, is charging, collecting, or receiving extortionate freight or passenger rates over its line of railroad in this Commonwealth, to hear and determine the matter as speedily as possible, and before doing so to mail not less than ten days beforehand a notice to any officer, agent, or employé of said company or corporation—for example, to a brakeman or section hand—stating the time and place of the hearing and the nature of the matter to be investigated. Upon such hearing the commission may hear whatever evidence, statements, and arguments it may choose to hear, whether the same be competent or incompetent as evidence, and may exclude and refuse to hear any and all competent evidence which it may choose to exclude and refuse to hear. Said railroad commission is further authorized and required by said act, if upon such investigation made upon such notice it shall determine that said company or corporation is or has been guilty of extortion in the particular charged, to make and fix, without any notice and without any investigation, what it shall deem to be a just and reasonable rate, toll, or compensation which said company or corporation may thereafter charge, and said rate, toll, or compensation shall be in full force and effect at the expiration of ten days after said commission shall have mailed a copy of the order fixing the same to any officer, agent, or employé of said company or corporation affected thereby—for example, as above stated, such notice may be mailed to a brakeman or section hand—
and at all times thereafter said commission may, at any time
9 and without notice and without investigation, modify or change the rates thus fixed by it; and if said company or corporation or any of its officers, agents, or employés shall thereafter charge, collect, or receive a greater rate than that made and fixed by said commission, as above stated, said company or corporation and said officers, agents, and employés are each by said act made guilty of extortion and, upon conviction, are each to be fined for the first offense not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction in any sum not less than one thousand dollars nor more than two thousand

dollars, and for third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars.

Thus, under said act, said railroad commission is authorized to fix the rates of your orator and all other railroad corporations without any notice and without any investigation. The rates so fixed are to go in full force and effect simply by lapse of ten days from the date of the mailing of the copy of the order fixing the same to any officer, agent, or employé of the railroad company, and unless the railroad corporation affected thereby straightway complies with said rates, although such rates may be a palpable invasion of such corporation's constitutional rights, such corporation will be subject to the exclusive fines fixed in said act with respect to each shipment passing over its road to which said commission desires said rates so fixed to apply, and every officer, agent,
10 or employé of said corporation either charging, collecting, or receiving the rates so fixed and charged by said corporation for each of such shipments in question, although the said corporation may have full right and power under the Constitution of the United States to charge said rates, will likewise be subjected to such excessive fines.

3. All your orator's rates charged, collected, or received within the State of Kentucky are just and reasonable and have not been sufficient for many years to give it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skillful manner. All of said rates are very much less than the rates which your orator has the right to charge by its contract with the Commonwealth of Kentucky hereinbefore set out. In addition to complying with this contract with the State of Kentucky in the matter of rates fixed and charged, and in addition to fixing and charging said rates subject to and in conformity with the requirements of law applicable to all common carriers that their rates shall be just and reasonable, your orator is subject to and complies *will* all the requirements of the laws of the State of Kentucky prohibiting unjust discrimination between individuals and localities in the matter of rates, which laws do not apply to all common carriers, but are reasonably restricted, so as to apply merely to corporations which operate railroads, and, in addition to complying with its agreement with the State of Ken-
11 tucky and with all the provisions of the law, your orator is forced to and does recognize the requirements of competition which constantly tend to reduce rates and which affect not merely rates to or from points known as competitive points, but in a greater or less degree all rates between all points, so as to prevent any rates becoming or remaining unreasonably high; yet notwithstanding the premises it was and is the purpose of the said act last above referred to to reduce the rates of your orator and other railroad companies in the State of Kentucky, and your orator believes and avers that the said act will have said effect and no other. Your orator submits, therefore, that the necessary effect of said act will be to impair the obligation of said contract between your orator and the

Commonwealth of Kentucky, to the great and irreparable injury of your orator, and the said act is therefore, as to your orator, null and void because in contravention of paragraph 1 of section 10 of article 1 of the Constitution of the United States, b[illegible] your orator believes and alleges that unless restrained by the order of this court the said defendants will proceed under said act, though the same is null and void, to reduce the said rates, and thereby violate the said contract rights, to your orator's irreparable injury, and your orator and its agents, servants, and employés will on that account, as will hereinafter be more fully set out, be subjected to a multiplicity of prosecutions and actions.

12 4. It is the duty of said railroad commission, composed, as aforesaid, of the defendants herein, to see that the law relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State. To this end they are authorized and required to inquire into the management of affairs of railroad companies; to inspect and examine their tracks, bridges, tunnells, and other structures; to supervise facilities at stations, and in many other ways to exercise administrative functions with respect to the railroads of said State. The constitution of said State divides the powers of its government into three distinct departments, each to be confined to a separate body of magistracy—those which are legislative to one, those which are executive to another, and those which are judicial to another—and declares that no person or collection of persons being of one of those departments shall exercise any power properly belonging to either of the others, except in the instances expressly directed and permitted in said constitution. By said constitution the judicial power of said State is vested in the senate, when sitting as a court of impeachment, and one supreme court, to be styled the court of appeals, and the courts established by said constitution, to wit, circuit courts, quarterly courts, county courts, justices' courts, police courts, and fiscal courts. The said railroad commission is not established as a court by said constitution and is not expressly directed or permitted by said constitution to exercise any judicial powers; on the

13 contrary, its powers are essentially and purely of an administrative character, and it essentially belongs to the exclusive department of the State government. The laws of said State not only fail to confer upon it judicial functions or powers, but prohibit the conferring of any such powers upon it, and by reason of the administrative functions with respect to the conduct and regulation of railroads which said commission is required and authorized to perform it is rendered essentially unfit to exercise judicial functions.

5. While all other common carriers, whether operating railroads or not, are subject only to the requirements that their rates shall be just and reasonable, and in case of controversy are entitled to have the judgment of the courts upon that question, the said act hereinbefore referred to singles out railroad corporations and denies them the equal protection of the laws applying to all other common carriers, and deprives said railroad corporations of any opportunity to have judicial determination

of the reasonableness of their rates when the same are called in question, and substitutes therefor the determination of said railroad commission, which is not and cannot be a court and which does not afford and cannot afford a judicial hearing or determination of questions brought before it; and whereas all other common carriers in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or consequence at-
14 taches to such judicial determination, yet railroad corporations are to be subjected, in the absence of any j-dicial determination as to whether their rates are reasonable or otherwise, and simply upon the determination of said non-judicial tribunal, the railroad commission, that such rates are unreasonable, to the penalty of having the power to make their rates taken out of their hands and vested exclusively in said railroad commission, which commission is then without any hearing, judicial or otherwise, to fix such rates as it may choose, and is thereafter without any notice and without any hearing, judicial or otherwise, to have the right at its pleasure to modify the rates so fixed by it, and if said railroad corporations fail to charge the rates thus fixed for them by this unjust and unconstitutional procedure they will be subjected for every shipment passing over their lines to which said railroad commission may desire said rates so fixed by it to apply to the prosecutions, fines, and penalties imposed in said act.

6. Your orator submits that under the Constitution of the United States, and independently of the aforesaid contract with the State of Kentucky, it is entitled to charge reasonable rates for the use of its property, and that it cannot be compelled to charge rates fixed by the railroad commission of Kentucky in the absence of a judicial investigation and determination that the rates so fixed are just and reasonable; that the said act makes no provision for any investigation or determination even by the railroad com-
15 mission that the rates fixed by it are just and reasonable, and the said commission may fix such rates without any notice to the railroad corporations to which said act applies as to what said commission proposes to do and without any investigation of the question involved, and may thereafter charge or modify said rates without any notice or investigation; but that even if said commission should choose to give notice and investigate such questions, such investigation and resulting determination would not satisfy your orator's constitutional rights to a judicial determination, because said commission is not a court, nor is it clothed with judicial functions, but, on the contrary, it is an administrative tribunal, which, under the law, cannot exercise judicial functions, and which, by reason of the functions it does exercise, is in its nature incapable of affording the judicial investigation to which your orator is entitled, and by said act your orator is denied the privilege and right to have it judicially determined by a court of competent jurisdiction whether the rates fixed and charged by it are just and reasonable, and whether the rates fixed by said commission amount to

a confiscation and spoilation of its property. If, therefore, defendants be permitted to proceed under said act, your orator will be compelled to charge the rates fixed by them without any opportunity for a judicial investigation and determination as to their reasonableness, and it will thus be deprived of the lawful use of its property and in substance and effect of its property itself without due process of law, and will also be denied the equal protection
16 of the laws, in violation of section 1 of article 14 of the amendments to the Constitution of the United States.

7. Your orator further says that the said act of March, 1900, relates to all freight and passenger rates charged, collected, or received by railroad companies in the Commonwealth of Kentucky, and is not restricted to rates actually charged, collected, and received, within the Commonwealth of Kentucky, for transportation commencing and ending within the said State, and therefore by its terms is an express and direct interference with and regulation of commerce among the States, inasmuch as by far the greater part of the freight and passenger rates charged, collected, or received by your orator within the Commonwealth of Kentucky are interstate rates charged or collected and received within said State for the transportation of passengers and freight between points in other States and points in this State, and therefore the said act is in conflict with paragraph 3 of section 8 of article 1 of the Constitution of the United States, which gives the Congress of the United States exclusive power to regulate commerce among the States, and which power has been exercised by Congress by an act of February 4, 1887, entitled "An act to regulate commerce among the States," and by the acts amendatory thereof, and that said act of March, 1900, is therefore null and void.

8. Defendants are giving it out in speeches and interviews that they intend to proceed at once under the said act, and, unless restrained by the order of this court, defendants will proceed at
17 once to hear and determine complaints under said act, although the same is in contravention of the Constitution of the United States in all the particulars hereinabove set out, and is therefore null and void, and will proceed thereupon to reduce your orator's rates to such as they think your orator should charge, and will thereafter at pleasure modify and still further reduce the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions through the State of Kentucky for failing to comply with such rates fixed in this unconstitutional manner, and it will be subjected *in* innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offense and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted, and heavily fined, to the great demoralization of the public service which your orator is

bound to render, and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator's contract rights will be impaired, it will be deprived of its property without due process of law, denied the equal protection of the law, and subjected to great and irreparable wrong and injury and to a vast multiplicity of prosecutions and actions in the courts of said
18 State *courts of said State.*

Forasmuch as your orator can have no adequate relief except in this court, and to the end that the defendants may, if they can, show why your orator shall not have the relief herein prayed, and that they answer this bill according to the course and practice of the court, but not under oath, the answer of each of them under oath being hereby expressly waived, your orator prays the said act of March, 1900, be decreed and declared to be in contravention of the Constitution of the United States, and therefore null and void, and that until the further order of the court said defendants be enjoined from taking any action whatever against or in relation to complainant under said act; that said injunction may be made perpetual upon final hearing, and as irreparable injury to your orator may ensue if defendants should take any action against or in relation to your orator under said act before the motion for a preliminary injunction can be heard, your orator prays that an order be granted restraining defendants from doing the acts herein sought to be enjoined, and your orator prays for such other and further relief as in equity it may be entitled to, and further prays that your honors also grant unto your orator a writ of subpœna of the United States of America, directed to the said C. C. McChord, J. F. Dempsey, and John C. Wood, commanding them on a day certain to appear and answer this bill and to abide and perform such
19 order and decree as to your honors shall seem meet and equitable; and your orator will ever pray, &c.

HARMEN, COLSTON, GOLDSMITH & HOADLEY,
C. B. SIMRALL,
Solicitors for Complainant.

UNITED STATES OF AMERICA, *District of Kentucky,* } ss:

W. J. Murphey, being duly sworn, states that he is general manager of The Cincinnati, New Orleans and Texas Pacific Railway Company, the complainant above named; that he has read the foregoing bill and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

W. J. MURPHEY.

Sworn to before me and subscribed in my presence this 11th day of July, A. D. 1900.

S. E. HIBBARD,
Notary Public, Hamilton Co., O.

And on the same day, to wit, on July 11th, A. D. 1900, there issued out of the clerk's office of said court the following subpœna in chancery, viz:

The President of the United States of America to C. C. McChord, J. F. Dempsey, John C. Wood, Greeting:

20 You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Covington, on the first Friday in August next, to answer a bill in equity exhibited against you in our said court by The Cincinnati, New Orleans & Texas Pacific Railway Company, which you shall in nowise omit under the penalty of the law.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of said circuit court hereto affixed, at the clerk's office of said court, in Covington, this 11th day of July, A. D. 1900, and in the 125th year of our Independence.

Attest: JOS. C FINNELL, *C. C., K. D.*

MEMORANDUM.—The defendants to enter their appearance in the suit in the clerk's office on or before the 6th day of August next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

JOS. C. FINNELL, *Clerk.*

And on a day following, to wit, on July 19th, A. D. 1900, came the complainants herein and filed the following motion, viz:

21 United States Circuit Court, District of Kentucky.

THE C., N. O. & T. P. R'Y CO.
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. WOOD.

Now comes the complainant herein and moves the court for a temporary restraining order herein.

C. B. SIMRALL,
HARMON, COLSTON,
GOLDSMITH & HOADLEY,
Solicitors for Complainant.

And on a day following, to wit, on July 21st, A. D. 1900, the following waiver of notice upon motion for restraining order was filed herein, viz:

United States Circuit Court, District of Kentucky.

THE C., N. O. & T. P. R'Y CO.
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. WOOD.

Now come the defendants herein and waive notice of the time and place of the hearing of the motion for the temporary restraining

order herein, and agree that the said motion may be submitted to the court without argument.

ROB'T J. BRECKINRIDGE,
Attorney for Defendant.

22 And on the same day, to wit, on July 21, A. D. 1900, the subpœna in chancery which issued herein on the 11th day of July, A. D. 1900, was returned and filed with the proceedings of the marshal thereon endorsed in words and figures following, to wit:

"Executed the within on C. C. McChord by delivering a true copy of same to him this July 13th, 1900.

A. D. JAMES,
U. S. Marshal,
By M. C. JAMES,
D. Marshal.

Fee, $2.00.

Executed on within J. F. Dempsey, at Madisonville, Ky., by delivering him a true copy of same this July 14th, 1900.

A. D. JAMES,
U. S. Marshal,
By S. YONTS,
D. Marshal.

Marshal's cost, $5.14."

And on the same day, to wit, on July 21st, A. D. 1900, came the defendants, by their attorneys, and filed in the clerk's office of said court the following demurrer, viz:

United States Circuit Court, District of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC Railway Company *vs.* C. C. McCHORD, &c. } Demurrer.

23 The defendants, C. C. McChord, J. F. Dempsey, and John C. Wood, not confessing all or any of the matters in the bill of complaint contained to be true as therein set forth, do demur to said bill, for that the same does not state such a case nor contain any matter of equity entitling the complainant to any relief against these defendants; that the court is without jurisdiction, and that the plaintiff has an adequate remedy at law.

Wherefore they pray the judgment of the court whether they shall be compelled to further answer said bill, and further pray to be dismissed with their costs.

KOHN, BAIRD & SPINDLE,
McQUOWN & BRODBURN,
ZACK PHELPS, *Counsel.*

I, Lewis McQuown, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is, in my opinion, well founded in law.

LEWIS McQUOWN.

UNITED STATES OF AMERICA, }
District of Kentucky. }

I, C. C. McChord, defendant in the above cause, being duly sworn, do say that the foregoing demurrer to the bill of complaint is not interposed for purposes of delay.

C. C. McCHORD.

Subscribed and sworn to before me by C. C. McChord this 20th day of July, 1900.

My commission expires January 12th, 1904.

DAVID W. BAIRD,
N. P., J. C., Ky.

24 And afterwards, to wit, on July 25th, A. D. 1900, an entry was made on the journal of said court clothed in words and figures following, to wit:

Journal "H," page 657.

Came the parties, by counsel, and, on the hearing of the complainant's bill and on the demurrer to the bill of complaint herein, offered to read to the court as a part of the bill of complaint the following acts of the General Assembly of the Commonwealth of Kentucky pertaining to the complainant's charter, and thereupon it was ordered that the said acts be, and they are, considered as read on the hearing of said demurrer and bill as part thereof: Act of February 15th, 1872; act of March 25th, 1872; act of February 4th, 1873; act of May 15th, 1886; and it is further ordered that complainant file in this cause as a part of its bill of complaint typewritten copies of said acts, which is accordingly done.

Said acts referred to in the foregoing entry were and are in words and figures following, to wit:

An act to authorize the trustees of the Cincinnati Southern railway to acquire the right of way and to extend a line of railway through certain counties in this Commonwealth.

25 Whereas, it is represented to this General Assembly that Miles Greenwood, Richard M. Bishop, William Hooper, Philip Heidelbach, and Edward A. Ferguson, of the city of Cincinnati, in the State of Ohio, were appointed, under and by virtue of an act of the General Assembly of the said State of Ohio, passed on the fourth day of May, in the year eighteen hundred and sixty-nine, a board of trustees, with authority to borrow a fund not exceeding ten millions of dollars, and to issue bonds therefor in the name of said city of Cincinnati, under the corporate seal thereof, of which said fund the said Miles Greenwood, Richard M. Bishop, William Hooper, Philip Riedilbach and Edward A. Furguson, and their

successors, are to be trustees, with power to expend the same in procuring the right to construct and in constructing a single or double track railway, with all the usual appendages, including a line of telegraph, between the city of Cincinnati and the city of Chattanooga, in the State of Tennessee, to be called and known as the Cincinnati Southern railway; and with power and capacity for the purposes aforesaid to make contracts, appoint, employ and pay officers and agents, and to acquire, hold and possess all the necessary real and personal property and franchises, either in the said State of Ohio or in any other State in which the said line of railway may extend, and with other powers in said act expressed; provided, the trustees of said road shall cause to be surveyed one or more routes for said road by a competent engineer and assistants from the city of Cincinnati, by the way of Nicholasville and Danville, to the State line, in the direction of Sparta, Tennessee; thence on the most direct practical route to
26 Chattanooga, having due regard to grade and cost of construction. The engineers shall lay before the board of trustees a map of the route, exhibiting the excavations, fills, bridges, grades, tunnels, &c., with approximate estimates of the cost of constructing the road from Cincinnati to the State line, thence to Chattanooga, which estimates shall show separately the cost of constructing this line and others that may be made and reported by engineers. Each line surveyed shall be reported to the citizens of Cincinnati, that they may express their preference for either route by their votes; and that the trustees shall locate the road-bed as indicated by the votes of the citizens and tax-payers of said city; and whereas, the said line of railroad cannot be constructed, nor the powers of said board of trustees be exercised within the Commonwealth of Kentucky; without the consent of the General Assembly thereof. The General Assembly reserves the right to change alter or, modify this act, and to regulate, by general laws, the rates of charges for the transportation of freights and passengers on said railway; therefore,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That the said board of trustees namely: Miles Greenwood, Richard M. Bishop, Wm. Hooper, Philip Heidelbach and Edward A. Ferguson, and their successors, by the name of the trustees of the Cincinnati Southern railway, be, and they are hereby authorized to
*en*tend, construct and maintain, within the Commonwealth
27 of Kentucky, the said line of railway, with a single or double track, with all the usual appendages, including a line of telegraph, and to exercise the powers vested in them under and by virtue of said act of the General Assembly of the State of Ohio, subject to the provisions and restrictions in this act provided.

§ 2. For the purpose of examining and surveying routes for the said line of railroad, the said trustees may, subject to liability for the actual damage done, enter upon any land in the counties of Josh, Bell, Knox, Whitley, Laurel, Clay, Owsley, Jackson, Estill, Madison, Clark, Bourbon, Harrison, Pendleton, Campbell, Kenton, Boone,

Gallatin, Grant, Owen, Scott, Franklin, Anderson, Woodford, Fayette, Jessamine, Mercer, Garrard, Boyle, Lincoln, Rockcastle, Casey, Pulaski, Russell, Wayne, Clinton, Cumberland, Monroe, Metcalfe, and Adair, and select from the routes so examined and surveyed a route for the same, commencing at a point to be selected by the said trustees where the said line of railway will cross the southern boundary of this Commonwealth, and running — either of said counties to the northern boundary line thereof, and across the Ohio river, so as to connect with the same line of railway in the State of Ohio. A copy of the survey and location of such route, and any alterations therein, shall be filed in the county clerk's office of the counties through which the said railway runs, within one year after such location or alteration.

§ 3. For the purpose of constructing and maintaining said line of railway and its appendages, the said trustees may acquire, by purchase or gift, so much land as may be necessary to construct,
28 complete, and operate their railway and its appendages; and it shall be lawful for them to apply to any circuit or county court, of any county through which it may be propesed said railway may pass, and for said court to appoint a competent engineer, and two disinterested commissioners, to examine the proposed route of said railway, and to take from the proprieotrs of land over which it is to pass a grant of the right of way, of such width as may be desired, provided, the same shall not exceed one hundred feet, and which may include the right to take stone, timber, earth or gravel for the construction of their road; and they, jointly and severally, shall have the power and authority to take and certify under their hands and seals, the acknowledgment of such grants in fee or right of way, and the separate acknowledgment of married women, that the clerks of the several courts have; and on the presentation of the grant and acknowledgement to the clerk of the county court where the land lies, it shall be the duty of the clerk to record the same as other deeds: and they shall be effectual against all persons according to their tenor: Provided, that where the parties are infants or absent, or refuse to make the grant, they shall hear any proof that may be adduced, and upon their own view proceed to value land required for the right of way, or lands required -or turn-outs for depot stations, or other appendages of said road, and also of earth stone, gravel or timber for the construction of said road, and report the value they have fixed, together with the evidence adduced, to the court appointing them, with a map or profile of the required groung; and said report shall be filed with the clerk of such
29 court, and a summons issued to the proprietors to show cause against the confirmation of the report; but if the proprietors shall be out of the Commonwealth, the summons may be executed upon a known agent in the county, then the court may order the appearance of the party at a named day, and appoint the clerk to give the proprietor notice by letter; and in case of there being infant, idiot, or lunatic proprietors, the court shall appoint guardians *ad litem* for them, and cause the guardian to appear and act for them; and in case an absent defendant does not appear, the

court shall appoint an attorney of the court to act for them. It shall be lawful for the trustees or any proprietor, or both, to traverse the report, and for the court to have the traverse tried in open court by competent jury; on which trial the report and evidence returned as aforesaid shall be heard, together with such proof as either party may produce. A new trial to the finding of the jury may be granted as in other cases. The report shall stand for hearing, as to any proprietor, when the process has been executed ten days, or after appearance of a proprietor on a day fixed for his appearance; and the court shall have jurisdiction to confirm the report, if no traverse is filed; and in case a traverse is filed, to have the same tried by a jury, and to give judgment upon the report or finding of the jury, and order the payment of the money, and the execution of the grant in accordance with the report; and to have the grant executed by a commissioner appointed by the court, and to order them to be recorded in the county clerk's office of the county: and either party may appeal from the judgment of the court.

§ 4. That the commissioner or jury, in estimating the value
30 of the lands proposed to be taken, shall not be confined to the actual value, but may take into consideration any consequential damage that may result to the adjoining proprietors of the land, and also the advantages and disadvantages the proposed road will be to such lands.

§ 5. That upon the affidavit of the engineer of said trustees, made and filed before the county judge of any county through which the proposed road may pass, that at any point more than one hundred feet is necessary properly to construct and operate said road, said trustees may acquire the right to so much land as may be necessary for that purpose, and in the manner provided in the preceding section.

§ 6. The said trustees may also, for the purpose of constructing and maintaining said line of railway, occupy or use any turnpike or plank road, street or other public way or ground or any part thereof, upon such terms and conditions as may be agreed upon between said trustees and the municipal or other corporations, persons, or public authorities owning or having charge thereof; and in case it shall be necessary to provide a new road, street, or other ground, in place of that so used or occupied, they may acquire the necessary land and cause the necessary improvement to be made thereon. If no agreement can be made for the right to use or occupy any road or street, or ground that may be necessary, the said trustees may take and appropriate said rights in the manner provided in the nect section; provided, that, before the damages are assessed, the court may fix such terms and conditions as may be deemed best for the public interest.

§ 7. The appropriations authorized in the preceding section
31 shall be made in the manner, and subject to the same right of traverse, writ of error, and appeal, provided by law for taking private property for the use of turnpike and plank road companies, except that the petition shall be filed in the circuit court of

the county in which said turnpike, plank roads, streets, or public ways or grounds may lie; and if a continuous portion of the same, lying in more than one county, is sought to be used or occupied, the proceedings may be instituted in the circuit court of any county in which any part of such continuous portion may lie; and the damages shall be assessed for the whole of such portion, whether lying in the county wherein the proceedings are instituted or in other counties; the writ shall be directed to the sheriff of the county in which the petition is filed.

§ 8. If, during the construction or after the completion of said line of railway, it shall be found necessary by said trustees to change the location or grade, or substitute other works or conveniences for those originally designed or constructed, to provide additional side tracks or other appendages for the proper management and operation of said railway, the said trustees may make such changes and provide such additional appendages, not departing from the general route originally selected by them; and, for the purpose aforesaid, may acquire or enter upon, take and appropriate, such lands or rights, as may be necessary, in the mode hereinbefore prescribed.

§ 9. Wherever, along the route selected by said trustees,
32 there shall be a railroad already constructed, or right of way or depot or other grounds acquired therefor, which railroad, rights of way or grounds, can be adopted as a part of the said line, it shall be lawful for persons, company or corporations owning the same, to sell to the said trustees the said railway, rights of way or grounds, or any part thereof, upon such terms and conditions as may be agreed upon between the said trustees and such persons, or the president and directors of such company or corporation: Provided, that no such agreement shall be binding upon the stockholders of any such company or corporation unless a majority in interest of said stockholders, as shown by the books of such company or corporation, shall ratify the same in person or by proxy, at a meeting to be held at the place of holding the election of directors, to be called after notice given of the object of the meeting, in the manner provided for notice of such elections.

§ 10. No permanent bridge or other work shall be so constructed as to materially interrupt or impair the navigation of such streams as are naturally navigable or as have been declared to be so by law.

§ 11. And whereas, under and by virtue of the above-mentioned act of the General Assembly of Ohio, the said board of trustees have power to borrow a fund for the construction of the said line of railway, not to exceed ten millions of dollars, and to issue bonds therefor in the name of the city of Cincinnati under the corporate seal thereof, bearing interest at a rate not to exceed seven
33 and three-tenths per centum per annum, payable at such times and places, and in such sums as shall be deemed best by said board; and attested by the city auditor of said city, who is to keep a register of same, and are to be secured by a mortgage on the said line of railway and its net income and by pledge of the faith of said city and a tax which it is made the duty by said act of

the council of said city annually to levy, sufficient, with said net income, to pay the interest, and provide a sinking fund for the final redemption of said bonds; Be it further enacted, That the respective holders of all such bonds are hereby declared to be entitled to hold, by way of mortgage, without any conveyance, the said line of railway and its appendages, and the net income thereof, and all the estate right and title, and interest of the said city of Cincinnati, and of the said board of trustees therein, until the respective sums mentioned in said bonds, and the interest thereon, shall be fully paid, without any preference one above another, by reason of priority of date of any of such bonds, or of the time when such holder became the owner of the same, or otherwise howsoever. The mortgage lien hereby given is to vest, as soon as rights of way or lands, whereon are to be placed the works and conveniences used in constructing, maintaining, or operating said railway, are acquired or taken, by virtue of the powers of the said trustees: Provided, that nothing herein contained shall effect the lien of any vendor upon lands so sold to said trustees, nor to be held to include the rolling-stock used in operating said road; and provided further, that any mortgage that may be made by any lessee or lessees of
34 said line of railway, or persons or company operating it, on the rolling stock used in operating said road, shall not have precedence over, but shall be at all times inferior in priority to judgments that may be obtained against them in any county through which said road may run, for wages, material, and supplies in running said road; for damages for breaches of contracts of affreightment for injury, loss or destruction of any property put on the cars on said road for transportation, or for any injury to persons or property occasioned in the running of said road.

§ 12. Said trustees shall survey and locate the route of said line of railway, and actually commence the construction thereof, within two years of the passage of this act; and shall continue such construction and complete the work within five years from its commencement, or within such further reasonable period, not exceeding ten years in all, as the governor may grant upon satisfactory evidence that they are progressing with due diligence and in good faith. The gauge of said railway shall be five feet.

§ 13. The charge for transportation on said railway shall not exceed thirty-five cents per hundred pounds on heavy articles, and — cents per cubic foot on articles of measurement for every hundred miles, and four cents a mile for every passenger.

§ 14. The taxes imposed on said line of railway and its appendages shall not exceed the rate imposed on other railroads within the State; provided, however, *that the trustees of the Cincinnati*
35 *Southern Railway Company shall pay into the treasury of this Commonwealth an amount equal to fifty cents per capita for each through passenger across the Commonwealth of Kentucky, and twenty-five cents for each passenger for one hundred miles of travel on said road within the limits of the State of Kentucky; and the said trustees shall also pay semi-annually into the treasury of this Commonwealth, an amount equal to one cent on each one hundred pounds of through freight*

shipped over said road; and all payments due to the treasury under this act shall be made in the manner, and at such times, as may be established by the auditor of public accounts of this State, except the payments required by this act. (Part in italics repealed by acts of March 25, 1872, and February 4, 1873.)

§ 15. The said trustees may sue and be sued, contract and take and hold property, and convey and transfer the same, by the name of the "trustees of the Cincinnati Southern railway." Conveyances by said trustees shall be signed by not less than three of them. They shall keep an office and an agent in the city of Covington, and an agent in every county through which said railway runs, upon whom process of service may be made. Actions against them or against the lessee or lessees of said line of railway, or persons or company operating it, other than those mentioned in sections ninety-three and ninety-four of the Code of Practice in Civil Cases, may be brought in any county in which any part of the said railway lies. When any action is rightly brought in any county, process may be issued to the county in which the office of the trustees is situate, and may be sent and returned by mail. And it is hereby made
36 a condition upon which said trustees construct and maintain said railway within this Commonwealth, that they thereby waive the right to remove any case from any of the courts of this State to any of the courts of the United States, or to bring a suit in any of the courts of the United Staces against any citizen of this State; and a violation of this condition shall operate as a forfeiture of the rights, privileges, and immunities granted in this act.

§ 16. The persons or company operating said railway, or any part thereof, as lessee or otherwise, shall receive and carry all passengers and freight coming or brought to it or them to be carried, and they shall make no discrimination against citizens of Kentucky in carrying freight or passengers on said line of railway, or any part thereof, nor shall they make any unjust discrimination in the favor of through freights or passengers against any way freights or passengers, or against freights and passengers from other railroads connecting with said railway in this State; but they shall charge and receive only the same, and no more, for the same services in transporting freight or passengers going to or coming from one connecting road, that they charge or receive upon those going to or coming from any other. They shall keep an officer and agent at some point along the line within this Commonwealth, and an agent in every county therein through which said railway runs, upon whom service of process may be made; and it is hereby made a condition upon which such persons or company may lease said railway, or any part thereof, or make any arrangement for operating the same that such persons or company thereby waive the right to remove any case from any of the courts of this State to any of the courts of
37 the United States, or to bring a suit in any of the courts of the United States against any citizen of this State; and a violation of such condition shall operate as a forfeiture of all rights acquired under such lease or arrangement; which forfeiture and the

other provisions of this section, this Commonwealth reserves the right to enforce by all necessary remedies and additional legislation.

§ 17. That the rights, privileges and immunities granted by this act, shall continue for and during the period of ninety-nine years, and not longer, and shall, during that time, be subject to be declared forfeited by any court of competent jurisdiction, by an action instituted by the direction of the General Assembly in the name of the Commonwealth, for any failure on the part of the said trustees, their successors or assigns, to comply with the terms, stipulations and obligations imposed herein for the benefit and security of this Commonwealth, or the people thereof; and before entering on any lands in this State, said trustees shall accept the provisions of this act.

§ 18. The following words and expressions in this act shall have the several meanings hereby assigned them, unless there be something in the context repugnant to such construction; that is to say, the word "lands" shall include not only lands and every estate therein, but also easements and franchises connected therewith. The word "trustees" shall mean the trustees for the time being appointed under the said act of the General Assembly of the State of Ohio, and shall include the said board of trustees and their successors. The expression "line of railway and
38 its appendages" shall extend to and include the works and conveniences of said railway, such as officers, stations, shops, sheds, depots, car-houses and other buildings, bridges, viaducts, tunnels, arches, piers, abutments, embankments, approaches, ways, aqueducts, culverts, sewers, drains, wharves yards, fences, telegraph posts and wire, tracks, turnouts, and turn-tables, and the rights of way and lands belonging to said trustees, whereupon the said and other like words and conveniences used in constructing, maintaining or operating said railway are placed. The expression "act of the General Assembly of the State of Ohio" shall mean the act of the General Assembly of the State of Ohio, entitled "An act relating to cities of the first class, having a population exceeding one hundred and fifty thousand inhabitants," passed on the 4th day of May, in the year 1869. The expression "line of railway" shall mean the line of railway between the city of Cincinnati, in the State of Ohio, and the city of Chattanooga, in the State of Tennessee.

§ 19. The General Assembly reserves the right to alter, amend or repeal this act, as provided in an act entitled "An act reserving power to amend or repeal charters and other laws" approved February 14, 1856.

§ 20. Be it further enacted, That this act shall take effect from and after its passage.

Approved February 13, 1872.

P. H. LESLIE, *Governor.*

39 An act to amend an act entitled "An act to authorize the trustees of the Cincinnati Southern railway to acquire the right of way and to extend a line of railway through certain counties in this Commonwealth," approved February thirteenth one thousand eight hundred and seventy-two.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That so much of the proviso to section fourteen of an act approved February thirteenth, one thousand eight hundred and seventy-two, entitled "An act to authorize the trustees of the Cincinnati Southern railway to acquire the right of way and to extend a line or railway through certain counties in this Commonwealth," as requires the trustees of the Cincinnati Southern railway to pay an amount equal to fifty cents *per capita* for each through passenger, and twenty-five cents for each passenger for one hundred miles, and so much of the proviso to the preamble to said act as requires the said trustees to report the lines surveyed to the citizens of Cincinnati, and to locate the road-bed as indicated by the votes of the citizens and tax-payers of said city, be and the same are hereby repealed.

§ 2. This act shall take effect and be in force from and after its passage.

Approved March 25, 1872.

P. H. LESLIE, *Governor.*

40 An act to amend an act entitled "An act to authorize the trustees of the Cincinnati Southern railroad to acquire the right of way and to extend a line of railway through certain counties of this Commonwealth."

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That so much of the proviso to section fourteen of an act approved February thirteenth, eighteen hundred and seventy-two, entitled "An act to authorize the trustees of the Cincinnati Southern railroad to acquire the right of way and to extend a line of railway through certain counties in this Commonwealth," as requires the said trustees to pay semi-annual-y into the treasury of this Commonwealth an amount equal to one per cent. on each one hundred pounds of through freight shipped over said road, be and the same is hereby repealed.

§ 2. This act shall be in force from and after its passage.

Approved February 4, 1873.

P. H. LESLIE, *Governor.*

An act to authorize railroads in the State of Kentucky to change their *guage* and adopt any desired *guage*, and to alter the same at pleasure.

§ 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That any company owning, controlling or

operating a line or lines of railway in this State may change or alter the guage of same, and adopt and maintain such guage therefor as the authorities of such company may deem expedient.

41 § 2. This act shall take effect from and after its passage.

Approved May 15, 1886.

J. PROCTOR KNOTT, *Governor.*

And on the same day, to wit, on July 25th, A. D. 1900, an entry was made on the journal of said court clothed in words and figures following, to wit:

Journal "H," page 657.

And now, on this day, came the complainant, The Cincinnati, New Orleans & Texas Pacific Railway Company, by George Hoadley, Jr., counsel, and came the defendants, Chas. C. McChord, J. F. Dempsey, and John C. Wood, by Robert J. Breckinridge, attorney general of Kentucky, D. W. Baird, and Lewis McQuown, counsel; and on motion of the said defendants, complainant not objecting thereto, the demurrer to the whole bill, heretofore filed herein by the said defendants, by consent of all parties, was brought on for hearing, and having been argued by counsel, and the court, being advised, considered the said bill to be sufficient and doth adjudge and order that the demurrer thereto be, and the same is, accordingly overruled.

And thereupon the court offered to give and assign time to the said defendants to answer the said bill, but the said defendants, by counsel, declined to answer herein at all and elected to stand by their demurrer.

42 And thereupon this cause, by consent in open court of all parties, presently came on for hearing in chief, and, all parties submitting this cause for final decree, the court doth order that the said bill of complaint be taken as confessed against the said defendants, and doth further adjudge, order, and decree that the said defendants, Chas. C. McChord, J. F. Dempsey, and John C. Wood, railroad commissioners of the State of Kentucky, and their successors in office, as such railroad commissioners of the State of Kentucky, and their agents and servants be, and they are hereby, perpetually enjoined and restrained from entertaining any complaint against complainant, or giving any notice to or conducting any hearing against complainant, or fixing any rates, toll, or compensation which complainant may charge, collect, or receive, or from entering any such rate, toll, or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent, or employé of the complainant, or from taking any action whatever against or in relation to the complainant under said act of March 10, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, or employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribe the manner of

enforcing the provisions of this act and penalties for the violation of its provisions," approved on the 10th day of March, 1900.

43 And the court doth further order that said defendants shall pay the costs of the complainant herein incurred. The said defendants pray an appeal from the foregoing decree to the Supreme Court of the United States, which is accordingly granted upon the execution by them of a bond, with surety to be approved by the court, in the penal sum of $500, conditioned according to law; and thereupon said defendants presented a bond with David W. Baird as surety thereon, which is approved by the court and ordered to be filed; and then came the complainant and waived service of a citation upon said appeal and consented that no citation thereon should be issued.

And on the same day, to wit, on July 25th, A. D. 1900, came the defendants and filed herein the following petition for appeal, viz:

United States Circuit Court, District of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY Company
vs.
CHARLES C. McCHORD, JAMES F. DEMPSEY, and JOHN C. WOOD.

To the Honorable Walter Evans, district judge and one of the judges of the above-named court, presiding therein:

44 The above-named defendants and appellants, Charles C. McChord, James F. Dempsey, and John C. Wood, in the above-entitled cause, conceiving themselves aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause under date of July 25, 1900, wherein and whereby, among other things, it was and is ordered and decreed that these defendants and appellants be perpetually enjoined from proceeding under a statute of the State of Kentucky approved March 10, 1900, to fix any rate against the complainant and appellee as directed and authorized by said statute, do hereby appeal to the Supreme Court of the United States from said order and decree for the reasons set forth in the assignment of errors, which is filed herewith, and they pray that this their petition for their said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated July 25, 1900.

KOHN & BAIRD,
ZACK PHELPS,
LEWIS McQUOWN, AND
R. J. BRECKINRIDGE,
Solicitors for Defendants and Appellants.

And on the same day, to wit, on July 25th, A. D. 1900, an entry was made on the journal of said court clothed in words and figures following, to wit:

45 Journal "H," page 658.

The petition on appeal is granted and the claim of appeal therein made is allowed, and the bond is fixed at $500.00; and thereupon came the counsel for the defendants and appellants in this case and presented their appeal bond in the sum of $500.00, which is approved.

And on the same day, to wit, on July 25th, A. D. 1900, the following assignment of errors was filed in the clerk's office of said court, clothed in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY Company
vs.
CHARLES C. MCCHORD, JAMES F. DEMPSEY, and JOHN C. WOOD.

Come the defendants, Charles C. McChord, James F. Dempsey, and John C. Wood, and file the following assignment of errors upon which they and each of them will rely upon their appeal from the decree made by this honorable court on the 25th day of July, 1900, in the above-entitled cause:

1.

46 That the United States circuit court in and for the district of Kentucky erred in overruling the demurrer interposed by these defendants and appellants to the original bill filed in said cause.

2.

That the said court erred in rendering judgment against these defendants and appellants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the facts, as stated in the bill of complaint in said cause.

3.

That the said court erred in rendering a perpetual order of injunction against these defendants and appellants.

4.

That the said court erred in holding that it had jurisdiction of these defendants and appellants upon the subject-matter set forth in the bill of complaint, and before these defendants and appellants had proceeded under said bill to make or establish any rates against the complainant and appellee.

5.

That the said court erred in holding that under the statute of the State of Kentucky complained of these defendants and appellants act as a judicial body or are delegated judicial powers, contrary to the constitution of the State of Kentucky.

6.

That the said court erred in holding that the said statute complained of deproved the complainant and appellee of its
47 property without due process of law or denies to the complainant and appellee the equal protection of the law, as guaranteed by the fourteenth amendment of the Constitution of the United States.

7.

That the said court erred in holding that the said statute complained of attempted to regulate interstate commerce and is in violation of article 1, § 8, of the Constitution of the United States.

8.

That the said court erred in holding that the said statute complained of is void and unconstitutional because it does not provide a judicial hearing for the complainant and appellee with reference to the rates to be fixed thereunder or after said rates shall have been fixed.

9.

That the said court erred in holding that the said statute complained of is void because it does not provide that the rates which shall be fixed thereunder shall apply to all railroads in the State of Kentucky, and that because of said failure the said statute denies to the complainant and appellee the equal protection of the law.

10.

That the said court erred in holding that the complainant and appellee under its charter has a contract with the State of Kentucky whereby its rates have been fixed, and that the statute complained of violates its said contract, as forbidden by article 1, § 10,
48 of the Constitution of the United States.

Wherefore the said defendants and appellants on appeal pray that the judgment of said court be reversed.

KOHN & BAIRD,
R. J. BRECKINRIDGE,
ZACK PHELPS, AND
LEWIS McQUOWN,
Counsel for Defendants.

And on the same day, to wit, on July 25th, A. D. 1900, a bond was filed in the clerk's office of said court, which was and is in words and figures following, to wit:

Circuit Court of the United States, District of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY Company
vs.
C. C. McCHORD, J. F. DEMPSEY, and JOHN C. WOOD.

Know all men by these presents that we, C. C. McChord, J. F. Dempsey, and John C. Wood, and David W. Baird, are held and firmly bound unto the Cincinnati, New Orleans & Texas Pacific Railway Company in the sum of five hundred dollars, to be paid to the said Cincinnati, New Orleans & Texas Pacific Railway Company, executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally,
49 and our and each of our heirs, executors, and administrators, firmly *in* these presents.

Sealed with our seals and dated this 25th day of July, A. D. 1900.

Whereas the above named C. C. McChord, J. F. Dempsey, and John C. Wood hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Covington:

Now, therefore, the condition of this obligation is such that if the above-named C. C. McChord, J. F. Dempsey, and John C. *Baird* shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. C. McCHORD,
J. F. DEMPSEY,
JOHN C. WOOD,
By LEWIS McQUOWN, *Att'y.*
DAVID W. BAIRD.

Sealed and delivered in presence of—
HENRY CASSIN,
Deputy Clerk U. S. Courts.

Approved July 25th, 1900.

WALTER EVANS.

50 UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

I, Jos. C. Finnell, clerk of the circuit court of the United States for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the cause set out in the caption hereto, as the same appears of record and on file in the clerk's office of said court.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Covington, Kentucky, this 28th day of July, 1900.

JOS. C. FINNELL, *Clerk.*

{Ten-cent U. S. internal-revenue stamp, canceled 7, 28, 1900. J. C. S., clerk.}

Endorsed on cover: File No., 17,885. Kentucky C. C. U. S. Term No., 400. Charles C. McChord, James F. Dempsey, and John C. Wood, appellants, *vs.* The Cincinnati, New Orleans & Texas Pacific Railway Company. Filed August 21st, 1900.

No. 296 re.

Motion to advance

Filed Oct. 8, 1900.

Office Supreme Court U. S.
FILED
OCT 8 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1900.

CHARLES C. McCHORD, &c., ... *Appellants,*

No. 806. *VERSUS*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee.*

And Sundry Other Cases.

MOTION TO ADVANCE.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

CHARLES C. MCCHORD, &c., ... *Appellants,*

396 *VERSUS*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, . *Appellee.*

CHARLES C. MCCHORD, &c., ... *Appellants,*

397 *VERSUS*

THE LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY, ... *Appellee.*

CHARLES C. MCCHORD, &c., ... *Appellants,*

398 *VERSUS*

THE CHESAPEAKE & OHIO RAILWAY COMPANY, . *Appellee.*

CHARLES C. MCCHORD, &c., ... *Appellants,*

399 *VERSUS*

THE SOUTHERN RAILWAY COMPANY IN KENTUCKY, . *Appellee.*

CHARLES C. MCCHORD, &c., ... *Appellants,*

400 *VERSUS*

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ... *Appellee.*

MOTION TO ADVANCE.

On behalf of the appellants to the above-entitled causes, we would respectfully move the court to advance them for hearing and assign them to be argued together upon some day which the court may fix.

On March 10, 1900, the State of Kentucky passed a law for the regulation of railroad business done within the State, and for the prevention of the exaction by railroads of extortionate freight and passenger rates, in words and figures as follows:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting, or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information, or have reason to believe that such rate or rates are being charged, collected, or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument, or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll, or compensation, which said railroad company or corporation may charge, collect, or receive for like services thereafter rendered. The rate, toll, or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent, or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent, or employe thereof, charge, collect, or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent, or employe shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon

a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction, in any sum not less than two thousand dollars nor more than five thousand dollars.

§ 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent, or employe shall have jurisdiction in all prosecutions against said officer, agent, or employe.

§ 3. Prosecutions under this act shall be by indictment.

§ 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

§ 5. In making said investigation, said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment.

As soon as the appellants in the above-entitled causes, who constitute the Board of Railroad Commissioners of the State of Kentucky, gave notice to the appellees that they would fix a time and place to hear and determine whether the appellees were charging an extortionate and unreasonable rate in violation of the statute, suits were brought by the appellees in the United States Circuit Court, for the District of Kentucky, seeking an injunction preventing the Railroad Commissioners (appellants) from taking any steps whatever under the above statute. The Commissioners had not taken any step under the statute, save and except to serve notice upon the appellees that they would proceed to hear complaints and to fix a just and reasonable rate if extortionate rates were being charged. In this situation, and before any thing had been done by the Commissioners, the Circuit Court decided that the above statute is, in whole and in every part, a violation of the Fourteenth Amendment of the Constitution of the United States and, therefore, null and void, and

entered a judgment perpetually enjoining the Railroad Commissioners from taking any step whatever under the statute, and from proceeding to fix any rate whatever.

It results from this that the Board of Railroad Commissioners of the State will be prevented from exercising any of the important powers and functions attempted to be conferred by this statute until these appeals shall have been determined. The judgments appealed from were entered upon demurrers to the petitions, and only questions of law are involved. All of the cases present exactly the same issues, and the petitions are exactly the same, with the exception that, in addition to the issues presented by the other cases, the first case (that of McChord, &c., v. Louisville & Nashville Railroad Company) presents the additional issue of a contract right claimed by the railroad with the State of Kentucky in reference to the rates and tolls which it is privileged to charge.

It is exceedingly important, both to all of the railroads doing business in the State of Kentucky and to the people of that State, that the questions here involved be speedily determined. The various appellee railroads are represented by different counsel, and, owing to the importance of the questions, it is desired that the court may allow more than the regular time allotted to one case for the argument of these cases, if the court shall determine to advance and hear them together. Counsel therefore respectfully move the court as follows:

1. That the foregoing cases be advanced and set down for argument, heard together, and briefed by counsel accordingly.

2. That a just allowance of time be made in which counsel will be permitted to address the court upon the various issues.

ROBERT J. BRECKINRIDGE,
Attorney General of Kentucky.
LEWIS MCQUOWN,
KOHN, BAIRD & SPINDLE,
ZACK PHELPS,
For Appellants.

October 8, 1900.

No. 396.

Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES C. MCCHORD, ETC., ... *Appellants*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, . *Appellee.*

AND SUNDRY OTHER CASES.

SUGGESTIONS ON MOTION TO ADVANCE.

As counsel for the appellees in the five cases in which the appellants have submitted motion to advance, we respectfully suggest that the Court, if it shall determine to advance and try them together, shall allow in the five cases the time usually allowed to three cases.

The questions which are common to all of them are those relating to the constitutionality of the law printed in appellants' motion, and involve the consideration of many authorities. The proper solution of these questions is of great importance to the appellees, and it is difficult to see how they can be properly presented in less time than that ordinarily given to two cases.

There is a separate and distinct question in the Louisville & Nashville Railroad case. That company claims that it has the contract right to fix its own tolls within the limits

prescribed by an irrepealable charter. This question is one of supreme importance to the company, and one requiring a careful examination of the particular terms of the acts of the Legislature granting and amending the charter of the Louisville & Nashville Railroad Company, and at least the time ordinarily allotted to one case should be allowed for the discussion of this question.

Counsel for appellees believe it to be advisable to hear all these cases together, and respectfully request the Court to assign to counsel for the appellants a day and a half, and to counsel for appellees a day and a half—the time to be divided among the various counsel for the respective parties, and the order of argument to be as may be agreed upon by counsel on both sides; recognizing, of course, that the appellants are entitled to open and close.

Respectfully submitted,

J. P. HELM AND HELM BRUCE AND W. D. HINES,
For L. & N. and L., H. & St. L. R. R. Cos.

WARDWORTH & COCHRAN,
For C. & O.

EDWARD COLSTON AND C. B. SIMRALL,
For C., N. O. & T. P.

ALEX. P. HUMPHREY,
For S. R. Co. in Ky.

Oct. 3, 1900.

The appellees in the above-entitled cases are hereby notified that the appellants, at the October term, 1900, of the Supreme Court of the United States, on, to wit, October 8, 1900, at the meeting of said court, or as soon thereafter as a hearing can be had, will move the said court that the above-entitled cases be advanced and set down for argument, heard together, and briefed by counsel accordingly.

ROBERT J. BRECKINRIDGE,
Attorney General of Kentucky.
LEWIS MCQUOWN,
KOHN, BAIRD & SPINDLE,
ZACK PHELPS,
Attorneys for Appellants.

The appellees in the foregoing cases, by counsel, hereby accept notice of the above motion, and waive service of the same.

HELM, BRUCE & HELM,
WALKER D. HINES,
Solicitors for Appellee in No. 396.
HELM, BRUCE & HELM,
Solicitors for Appellee in No. 397.
WADSWORTH & COCHRAN,
Solicitors for Appellee in No. 398.
HUMPHREY, BURNETT & HUMPHREY,
Solicitors for Appellee in No. 399.
HARMEN, COLSTON, GOLDSMITH & HOADLEY,
C. B. SIMRALL,
Solicitors for Appellee in No. 400.

Nos. 144, 145, 144, 145.

Motion for additional time.

Office Supreme Court
FILED
OCT 28 1901
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

~~Nos. 396, 397, 398, 399 and 400.~~

OCTOBER TERM, 1901.

Filed Oct. 28, 1901.

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee.*

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
SOUTHERN RAILWAY COMPANY IN KENTUCKY, - *Appellee.*

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY CO., *Appellee.*

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., - - - - - - - *Appellee.*

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, - *Appellee.*

The appellants and appellees unite in moving the court for an extension of time of one hour on each side to argue the above-styled cases. They involve the same questions, except that in the Louisville & Nashville Railroad Company case the question of contract is involved, which is not involved in the other cases.

JAMES P. HELM AND HELM BRUCE, for
Louisville & Nashville Railroad Company, and
Louisville Henderson & St. Louis Railway Company.

WALKER D. HINES, for
Louisville & Nashville Railroad Company.

A. P. HUMPHREY, for
Southern Railway Company in Kentucky.

EDWARD COLSTON, for
Cincinnati, New Orleans & Texas Pacific Railway Co.

W. H. WADSWORTH, for
Chesapeake & Ohio Railway Company.

DAVID W. BAIRD, for
Appellants.

Supreme Court of the United States.

Nos. 396, 397, 398, 399 and 400,

OCTOBER TERM, 1901.

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee.*

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, - *Appellee.*

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY CO., *Appellee.*

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., - - - - - - *Appellee.*

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, - *Appellee.*

SUGGESTIONS ON MOTION TO EXTEND TIME.

When these cases were argued before, upon hearing of the motion to extend the time, the court granted an extension and allowed one hour extra to each side to argue. The motion before was to allow the same time for the five above-styled cases as is usually allowed for three cases, but the court, after considering it, gave an extension of only one hour to the side. The proper solution of these questions is of great importance to the parties, and it is difficult to see how they can be properly presented in less time than the court allowed on the other argument. There is a separate and distinct question in the Louisville & Nashville Railroad Company case, that company claiming it has a contract right to

fix its own tolls within the limits prescribed by an irrepealable charter. This question is of extreme importance to the company, and one requiring a careful examination of the particular terms of the acts of the legislature granting and amending the charter of the Louisville & Nashville Railroad Company. Respectfully submitted.

JAMES P. HELM AND HELM BRUCE, for
Louisville & Nashville Railroad Company, and
Louisville Henderson & St. Louis Railway Company.

WALKER D. HINES, for
Louisville & Nashville Railroad Company.

A. P. HUMPHREY, for
Southern Railway Company in Kentucky.

EDWARD COLSTON, for
Cincinnati, New Orleans & Texas Pacific Railway Co.

W. H. WADSWORTH, for
Chesapeake & Ohio Railway Company.

DAVID W. BAIRD, for
Appellants.

1141 to 1145

Nos. 396-400

396-400.

Office Supreme Court
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JAMES H. McKENNEY

Def.s McQuown, Kohn & Baird

SUPREME COURT OF THE UNITED STATES.

Filed Dec. 31, 1900.

Charles C. McChord, et al., - - - Appellants,

VERSUS

Louisville & Nashville Railroad Company, - Appellees.

AND FOUR OTHER CASES HEARD THEREWITH.

BRIEF FOR APPELLANTS.

ROBERT J. BRECKINRIDGE,
Attorney General of Kentucky.
LEWIS McQUOWN,
AARON KOHN,
ZACK PHELPS,
DAVID W. BAIRD,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES.

CHARLES C. McCHORD, &c., - - - *Appellants,*
396 vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellee.*

CHARLES C. McCHORD, &c., - - - *Appellants,*
397 vs.
THE LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY, - - - - - *Appellee.*

CHARLES C. McCHORD, &c., - - - *Appellants,*
398 vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY - - - - - - - *Appellee.*

CHARLES C. McCHORD, &c., - - - *Appellants,*
399 vs.
THE SOUTHERN RAILWAY COMPANY IN KENTUCKY, - - - - - - - *Appellee.*

CHARLES C. McCHORD, &c., - - - *Appellants,*
400 vs.
THE CINCINNATI NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, - - - *Appellee.*

BRIEF FOR APPELLANTS.

Statement.

The above entitled five causes have been ordered to be heard together, and are appealed from final decrees of the Circuit Court of the United States for the District of Kentucky, entered on the 25th of July, 1900, perpetually

enjoining the appellants, railroad commissioners of the state of Kentucky, from exercising any authority or doing any of the things required by an act of the General Assembly of the Commonwealth of Kentucky, approved March 10, 1900, which is in words and figures as follows:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation effected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employe thereof, charge, collect or receive a greater or higher

rate, toll or compensation, for like services thereafter rendered, than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction in any sum not less than one thousand dollars, nor more than two thousand dollars, and for a third and succeeding convictions in any sum not less than two thousand dollars, nor more than five thousand dollars.

"Sec. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employe, shall have jurisdiction in all prosecutions against said officer, agent or employe.

"Sec. 3. Prosecutions under this act shall be by indictment.

"Sec. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"Sec. 5. In making said investigation, said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the state, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

The main questions involved are:

1. The jurisdiction of the court to render a decree of injunction in any of these cases.

2. The constitutionality, both under the state and Federal Constitutions, of the act above set out.

While the above act was approved on March 10, 1900,

it did not go into effect, under Section 55 of the Constitution of Kentucky, until ninety days thereafter. Said section reads as follows:

> "No act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency, when, by the concurrence of a majority of the members elected to each House of the General Assembly, by a yea and nay vote entered upon their journals, an act may become a law when approved by the governor; but the reasons for the emergency that justifies this action must be set out at length in the journal of each House."

For the purposes of convenience, we shall designate the first named appellee, Louisville & Nashville Railroad Company, as the Louisville Company; the second appellee, The Louisville, Henderson & St. Louis Railway Company, as the Henderson Company; the third appellee, The Chesapeake & Ohio Railway Company, as the Chesapeake Company; the fourth appellee, The Southern Railway Company in Kentucky, as the Southern Company, and the fifth appellee, The Cincinnati, New Orleans & Texas Pacific Railway Company, as the Cincinnati Company.

On the 5th day of July, 1900, all of the above appellees, except the Cincinnati Company, filed their bills in equity in the United States Circuit Court, sitting at Louisville, seeking a temporary injunction, and, on final decree, a perpetual injunction against the appellants, Charles C. McChord, J. F. Dempsey and John C. Wood, comprising the board of railroad commissioners for the state of Kentucky, restraining them from exercising any of the powers or doing any of the acts set forth in the above act.

On the 11th day of July, 1900, the Cincinnati Company filed a similar bill in the circuit court, sitting at Covington.

All of the bills are apparently drawn upon the same model, make the same allegations and pray the same relief, and the questions involved are common to all, except that in the bill of the Louisville Company, and in the bill of the Cincinnati Company, the additional question of a contract with the state of Kentucky, relative to rates that can be charged, is raised.

The Louisville Company is a corporation of the state of Kentucky, operating lines within the state under original construction, as set out in its bill, amounting to 413.53 miles, and operating under purchase 925.59 miles, or, in all, 1,339.12 miles. It alleges in its bill that both within and without the state of Kentucky it owns and operates 3,000 miles of railroad. The gravamen of its complaint is that, under and by virtue of its original charter granted by the state of Kentucky on March 5, 1850, the maximum rates which it might charge for freight and passengers were fixed, and that the rates so fixed amount to a contract with the state of Kentucky within the protection of the Federal Constitution. It further claims that the Act of March 10, 1900, operates to deprive it of its property without due process of law, and to deny it the equal protection of the laws, and that the act is an attempt by the state to regulate interstate commerce.

The Henderson Company is also a corporation, organized under the laws of the state of Kentucky, and whose termini are all within the territorial limits of that state. Its bill is exactly similar to that of the Louisville Company, except that it claims no contract relative to its rates.

The Chesapeake Company is a corporation, under the laws of the state of Virginia, operating, as alleged in its bill, more than 440 miles of railroad in the state of Kentucky, as a part of its system of more than 14,444 miles in extent as traversed in various states. The allegations of its bill are exactly similar to those of the Louisville Company, except that it claims no contract right.

The Southern Company is a corporation, organized under the laws of the state of Kentucky, *and operating*, as alleged in its bill, 122 miles of railroad in the state of Kentucky, and the allegations of its bill are exactly similar to those of the Louisville Company, except that it claims no contract right.

The Cincinnati Company is a corporation, organized under the laws of the state of Ohio, operating 197.88 miles of railroad in the state of Kentucky, and, in addition thereto, it operates a line of railroad in Ohio and in Tennessee. The allegations of its bill are the same as those of the Louisville Company. It claims a contract under the protection of the Federal Constitution, touching its rates, by an act of the state of Kentucky, approved February 13, 1872.

It will thus be seen that all of the appellees invoked the jurisdiction of the Federal court upon the theory that the Act of March 10, 1900, invades certain rights of the railroads guaranteed by the Constitution of the United States.

Motions for interlocutory injunctions in the several cases were made on July 9, 1900, and passed to July 13th, and on that day the appellants interposed demurrers to the bills in the several cases, on the ground that the bills did not show a case entitling the complainants to any relief, and because the court was without jurisdiction to determine the matters set forth. On the 16th day of July, 1900, an interlocutory injunction, in acordance with the prayer of the bill, was entered and an opinion delivered. On the 25th day of July, 1900, a final decree was entered in each of the cases, overruling the appellants' demurrer to the bills, and upon the appellants declining to plead further the temporary injunction was made perpetual, the decree reading as follows:

> "And thereupon, this cause, by consent in open court of all parties, presently came on for hearing in

chief, and, all parties submitting this cause for final decree, the court doth order that the said bill of complaint be taken as confessed against the said defendants, and doth further adjudge, order and decree that the injunction heretofore granted in this cause to restrain the said defendants, Charles C. McChord, J. F. Dempsey and John C. Wood, from entertaining any complaint against complainant, or giving any notice to or conducting any hearing against complainants, or fixing any rates, toll or compensation, which complainant may charge, collect or receive, or from entering any such rate, toll or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent or employe of the complainant, or from taking any action whatever against or in relation to the complainant under said Act of March 10, 1900, entitled, 'An act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents or employes, from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribe the manner of enforcing the provisions of this act and penalties for the violation of its provisions,' approved on the 10th day of March, 1900, be, and it is hereby, made perpetual, as well to said named defendants as to their successors in office, of the railroad commission of Kentucky, and their agents and servants.

"And the court doth further order that the said defendants shall pay the costs of the complainant herein incurred."

From these decrees appeals were prayed and taken to this court, and for a reversal thereof the following are the

Errors Assigned.

1.

"That the United States Circuit Court in and for the District of Kentucky erred in overruling the demurrer interposed by these defendants and appellants to the original bill filed in said cause.

2.

"That the said court erred in rendering judgment against these defendants and appellants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the facts, as stated in the bill of complaint in said cause:

3.

"That the said court erred in rendering a perpetual order of injunction against these defendants and appellants.

4.

"That the said court erred in holding that it had jurisdiction of these defendants and appellants upon the subject matter set forth in the bill of complaint, and before these defendants and appellants had proceeded under said bill to make or establish any rates against the complainant and appellee.

5.

"That the said court erred in holding that under the statute of the state of Kentucky complained of, these defendants and appellants act as a judicial body, or are delegated judicial powers, contrary to the Constitution of the state of Kentucky.

6.

"That the said court erred in holding that the said statute complained of deprives the complainant and appellee of its property without due process of law, or denies to the complainant and appellee the equal protection of the law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

7.

"That the said court erred in holding that the said statute complained of attempts to regulate interstate commerce, and is in violation of Article 1, Section 8 of the Constitution of the United States.

8.

"That the said court erred in holding that the said statute complained of is void and unconstitutional because it does not provide a judicial hearing for the complainant and appellee with reference to the rates to be fixed thereunder, or after said rates shall have been fixed.

9.

"That the said court erred in holding that the said statute complained of is void because it does not provide that the rates which shall be fixed thereunder shall apply to all railroads in the state of Kentucky, and that because of said failure the said statute denies to the complainant and appellee the equal protection of the law.

10.

"That the said court erred in holding that the complainant and appellee, under its charter, has a contract with the state of Kentucky, whereby its rates have been fixed, and that the statute complained of violates its said contract, as forbidden by Article 1, Section 10 of the Constitution of the United States."

Argument.

The above assignment of errors, for convenience of argument, can be grouped, and shall be discussed by us, under the following condensed propositions:

1. The power and functions delegated to the board of railroad commissioners by the state of Kentucky, under the Act of March 10, 1900, were either entirely legislative, or so far quasi-legislative, as not to be within the control or direction of the judiciary, and until the board of railroad commissioners executed some of the powers and established a rate, there was no jurisdiction in the judiciary, either state or Federal, to prevent it from acting.

2. The act is not an attempt by the state to regulate or interfere with interstate commerce, but applies entirely to domestic commerce.

3. Judicial power is not conferred upon the board by the act, nor does any question relating to the regulation of rates become a judicial question until after the rate is made. Then, for the first time, are the parties of right entitled to a judicial investigation with reference to the reasonableness of the rate which has been fixed.

4. The act is equal and uniform in its operation, and does not confer arbitrary power upon the board.

5. Neither the Louisville Company nor the Cincinnati Company has any contract with reference to its rates under the protection of the Federal Constitution, even if this important function of the police power be a legitimate subject matter of a contract.

The converse of each of these propositions was contended for by the appellees and adjudged in their favor by the decree appealed from.

Jurisdiction.

We disclaim any purpose of questioning the jurisdiction of the court to restrain the enforcement against railroads of a tariff rate that is unreasonable.

By the repeated adjudications of this court it is held that an unreasonably low rate operates to deprive the railroad of the use of its property, and, to that extent, of its property, without due process of law, and that to deny to a railroad a reasonable profit on its investment is to deny to it the equal protection of the law guaranteed by the Fourteenth Amendment of the Federal Constitution, and, therefore, the Federal court has original jurisdiction.

Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Minnesota, 134 U. S. 418.
Railroad v. Tompkins, 176 U. S. 167.

In taking jurisdiction, however, under this rule, it is an essential condition that a rate has been fixed, because until then there is and can be no such trespass upon or taking of property, or even an attempt to trespass upon or to take, as violates the guaranties of the Fourteenth Amendment.

In the case at bar, it will be observed, the jurisdiction of the court was invoked and exercised before any rate had been fixed, and, in fact, before even any attempt had been made to fix a rate. The bills of complaint simply allege that the board of railroad commissioners had given notice that they would investigate the reasonableness of the rates in force by the railroads, and thus the hands of the board in the exercise of this important state function were stayed, even before the threshold was reached. For the maintenance of this jurisdiction, it was the theory of the circuit court that the Act of March 10, 1900, is so far void, because of its invasion of constitutional rights, as to give authority for no act that can be committed under it, and protect nothing that can be done by virtue of its authority.

This principle would be correct were it confined exclusively to executive acts, but has no application insofar as it applies to legislative or quasi-legislative acts, nor to administrative acts requiring the exercise of discretion and judgment, at least, where only, in certain contingencies, the exercise of such discretion or judgment will invade the constitutional rights of others. It is only property and property rights that can move a court of equity to action.

Taylor v. Beckham, 178 U. S. 548, 610.
Ex parte Sawyer, 124 U. S. 200.

With the exception of the case at bar, and the case of Stone v. Trust Company, 116 U. S. 646, where the jurisdiction of the Federal court has been assumed, the rate

has been fixed and the jurisdiction has been invoked on the ground that it was unreasonable and operated to deprive the railroad of either its property or the lawful use of its property.

It is well established by a long line of cases in this court, which will be considered in the course of this argument, that the fixing or making of a rate is a legislative or, at least, a quasi-legislative function, and that it is only the reasonableness of a rate which has been fixed that calls for the exercise of a judicial investigation. The courts have never assumed to make a rate, nor to say what would be or is a reasonable rate. Their jurisdiction is exhausted when they determine whether or not the rate which has been fixed by other departments of the government is or is not reasonable. The making of a rate is the making of a rule for future conduct, and, therefore, legislative. An investigation of the reasonableness of a rate fixed determines its operation in the past, and is judicial. This line of demarcation is sharply drawn by the decisions.

It is in this feature that the case at bar differentiates from all other cases that have heretofore been before this court touching the question of the power of states with reference to the fixing of reasonable maximum rates for common carriers, and it is upon this differentiation that we contend that the court was without jurisdiction to decree an injunction. We do not understand the rule to be that the judicial power is exercised as a veto power upon the legislative department, nor that appeals from other departments of the government lie to the judiciary simply for the purpose of determining abstract questions.

In the matter of the making of maximum rates for common carriers, until a rate has been fixed, to stay the hands of the state is to exercise the jurisdiction of the court for the determination of a mere abstraction. Until the rate is fixed, it can not be said that an unreasonable rate will be fixed, nor can it be said that any rate will be

fixed. If the commission, charged with quasi-legislative power, may be enjoined, in advance of its action, may not the legislature itself be enjoined, upon an allegation that it will make an unreasonable rate? If the legislature may confer the power to make rates upon the commission, in the exercise of this power, it is entitled to the same immunity from judicial interference which the legislature itself enjoys.

In the case of Railroad v. Wellman, 143 U. S. 359, in an opinion delivered by Mr. Justice Brewer, this court said:

> "The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislaure to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true."

In the case of Railroad v. Minnesota, 134 U. S 418, Mr. Justice Bradley uses the following language, which, while not applicable to the case after a rate has been fixed, is, we think, applicable to the case at bar:

> "There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive, unless an appeal is given therefrom. The important question always is: What is the lawful tribunal for the particular case?"

In reference to the fixing of a rate, it must be conceded that the lawful and only tribunal is the legislative department of the government. If this be true, then with reference to the fixing of a rate an attempt to stay the hand and hush the voice of the board of railroad commis-

sioners is the same as enjoining the legislature, and, therefore, the state.

We concede that in the cases cited, supra, of Reagan v. Trust Company, 154 U. S. 362, and Smyth v. Ames, 169 U. S. 466, with reference to the enforcement of a rate which had been fixed, it was ruled that an action against the railroad commissioners was not an action against the state of which they were officers.

But in the case of Fitts v. McGhee, 172 U. S. 516, it was held that a suit to restrain the governor and attorney general of the state of Alabama from putting into force and effect a schedule of maximum rates fixed by the legislature for the use of a toll bridge over the Tennessee river, between the counties of Colbert and Lauderdale, known as the Florence Bridge, was a suit against the state, and that the United States Circuit Court was without jurisdiction to decree any relief prayed in the bill, Mr. Justice Harlan, in delivering the opinion of the court, distinguished the principles applicable to that case from those applicable to the railroad commissioner cases, supra, and kindred cases.

We contend that the case at bar is much more nearly allied in principle to this case than to the railroad commissioner cases. In the case cited, the Act of the General Assembly of Alabama, approved February 9, 1895, prescribed certain maximum rates of toll to be charged on the Florence Bridge, and declared that should the owners, lessees or operators of the bridge, by themselves or agents, demand or receive from any person a higher rate of toll than was prescribed, he or they should forfeit to such person twenty dollars for each offense, to be recoverable before any justice of the peace or notary public or ex-officio justice of the peace of either of the counties of Colbert or Lauderdale. By a provision of the Alabama Code then in vogue, it was provided that any person acting as an officer, agent, servant or employe of any turnpike company, incorporated road

or bridge company who pays, receives or demands any greater charge or toll than is authorized by the charter, or who takes, fixes or receives any unreasonable charge or toll, may, on conviction, be fined not more than one hundred dollars. Under the act no particular officer was charged with the duty of its enforcement, but this fell among the general duties of the executive officers charged with the enforcement of the laws generally. When the act was passed, the cases of Thomas v. Memphis & Charleston Railroad Company, and Central Trust Company v. Same, were pending in the United States Circuit Court for the District of Alabama, and shortly after the passage of the act, to wit, February 14, 1895, Charles M. McGhee and Henry Fink were appointed receivers of the railroad. The railroad was the owner of the bridge in question, and claimed in its behalf a contract with the state of Alabama governing its tolls. After the passage of the act the railroad refused to put in effect the schedule of tolls fixed, and a great number of suits were brought to recover the penalties, and a number of indictments were returned against the officers, agents and employes. In this condition of affairs a bill was filed in the United States Circuit Court, in equity, by the receivers, against the state of Alabama, William C. Oates, its governor, and William C. Fitts, its attorney general, seeking to enjoin and restrain the defendants from enforcing the act and from prosecuting the indictments, and from collecting the penalties, and to restrain them from seeking, by mandamus or any other procedure, to enforce the schedule of rates. Subsequently, and before decree, the bill was dismissed as against the state and prosecuted against its governor and attorney general. When the final decree was rendered the term of William C. Oates, as governor, had expired, and the case was discontinued as to him, but a final decree was entered, adjudging the act of the legislature of the state to be a violation of the constitutional rights of the owners of the bridge, and of

the complainants, as their representatives, in that it fixed a rate of toll for the bridge, which was not fairly and reasonably compensatory, and the said act was declared to be invalid and inoperative, and the interlocutory injunction was made perpetual. By the interlocutory decree, William C. Fitts, the attorney general of the state, and William H. Gillian, who had been added as a party defendant, and all persons whomsoever, were enjoined from instituting or procuring the institution of any proceeding against the plaintiffs, or either of them, by mandamus or otherwise, to compel the observance and obedience of the act in reference to the rate of tolls fixed thereby over the Florence Bridge. On behalf of the complainants it was contended, under the rule of the case of Railroad *v.* Minnesota, 134 U. S. 459, that, as the act did not provide for a judicial hearing as to the reasonableness of the rates, appropriate jurisdiction existed in the Federal courts sitting in equity to determine the constitutionality of the act, and in one suit to settle all litigation and prevent a multiplicity of actions. It was contended by the defendants that the suit was practically one against the state of Alabama, and, therefore, inhibited by the Eleventh Amendment of the Federal Constitution. In holding that the circuit court was without jurisdiction, because the suit was practically one against the state of Alabama, Mr. Justice Harlan, delivering the opinion of the court, said, in distinguishing the principles of that case from the principles governing the railroad commission cases, supra:

> "Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit

against individuals holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which can not be applied to the states of the Union consistently with the fundamental principle that they can not, without their assent, be brought into any court at the suit of private persons. *If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination.* (The italics are ours.) . . . The plaintiffs state that the toll-gatherers in their service had been indicted in a state court for violating the provisions of the Act of 1895 in respect of tolls. Let them ap-

pear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. Robb v. Connolly, 111 U. S. 624 (28: 542). And if the question is determined adversely to the defendants in the highest court of the state in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constituted no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court."

To the same effect, see In re Ayres, 123 U. S. 443, 485, 496-500, 505.

In the case at bar the railroad commissioners are not charged with the execution of, nor have they anything to do with, the enforcement of the rate fixed by them under the Act of March 10, 1900, except, perhaps, to direct the attention of the grand jury or the prosecuting officer to the matter. The power conferred upon them by that act is exhausted in making and changing the rate, from time to time, so as to keep it fair and reasonable to the public. In this feature the act in question is radically different from the legislative acts under investigation in the railroad commission cases, supra.

The case at bar is stronger for the application of the principle applied in the case of Fitts v. McGhee than were the facts of that case, because in the case at bar no rate had been fixed by the commissioners when the jurisdiction of the court was invoked, but they had just entered upon the performance of a duty over which, it must be conceded, the courts have no control, to wit, the making of a rate for future guidance.

In the case of Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Company, 167 U. S. 479, it was

contended, in behalf of the commission, that the power to pass upon the reasonableness of existing rates implied a right to prescribe rates. Mr. Justice Brewer, in passing upon this contention in the opinion delivered for the court, said, on page 494:

> "There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and if we examine the legislative and public history of the day it is apparent that there was no serious thought of doing so."

And again, on page 501:

> "The power given is the power to execute and enforce, not to *legislate*. The power given is partly judicial, partly executive and administrative, *but not legislative*." (Italics are ours.)

And again, on page 505:

> "We have, therefore, these considerations presented: First, *the power to prescribe a tariff of rates for carriage by a common carrier is a legislative, and not an administrative or judicial function*; and having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second, that Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently

> used, and if Congress had intended to grant such a power to the Interstate Commerce Commission, it can not be doubted that it would have used language open to no misconstruction, but clear and direct. Third, incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by implication carry to the commission or invest it with the power to exercise the *legislative function of prescribing rates* which shall control in the future." (Italics are ours.)

And again, on page 509:

> "Our conclusion, then, is that Congress has not conferred upon the commission the *legislative power* of prescribing rates, either maximum or minimum or absolute." (Italics are ours.)

The doctrine of this case, referring the power to fix rates to the legislative department of the government, was followed and applied in the case of Interstate Commerce Commission v. Alabama Midland Railway Company, 168 U. S. 144.

In the case of Railroad v. Wellman, 143 U. S., Mr. Justice Brewer, in speaking for the court, said:

> "The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

To the same effect are the cases of

> Stone v. Trust Company, 116 U. S. 307.
> Railroad v. Minnesota, 134 U. S. 418.

The function in fixing a rate is not purely administrative, nor executive, but is essentially legislative, because it fixes a rule or standard for future conduct, an essential attribute of the law-making department. Though a leg-

islative function, it is well established that it can be delegated to an administrative board. Though it was formerly considered that there was some distinction between the operation and effect of a rate fixed by the legislature from that fixed by a board, it is now established that there is none.

Covington Turnpike Company v. Sandford, 164 U. S. 580.
Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Gill, 156 U. S. 664.
Railroad v. Minnesota, 134 U. S. 418.
Budd v. New York, 143 U. S. 517.
Lake Shore v. Smith, 173 U. S. 684.

Mr. Justice Bradley, in his dissenting opinion in the case of Railroad v. Minnesota, 134 U. S., likened the performance of such a duty by a commission to the performance of a similar duty by a committee of the legislature, and held that each was in the discharge of exactly the same character of power.

We contend, therefore, that for the court to assume jurisdiction against the railroad commissioners in advance of a rate fixed, as in the case at bar, and for the purpose of preventing them from fixing a rate, is to deny to the state the right to control and regulate common carriers with reference to their rates, which has never been denied as a proper exercise of the police power.

Not even did those who dissented from the rule in the case of Munn v. Illinois, 94 U. S. 113, contend that it was without the power of the state to regulate public corporations and quasi-public corporations which perform public duties.

To stay the action of the board of commissioners with reference to the performance of this duty would permit the court, by injunction, to restrain the legislature, a power which has never been conceded by the courts to exist. See

Cooley on Constitutional Limitation, 55, 153.
State v. Hitchcock, 1 Kan. 178.
State v. Boone County, 50 Mo. 317.
Patterson v. Barlow, 60 Pa. St. 54.

The theory of our government is that the departments shall be co-ordinate, separate and distinct, and that neither shall encroach upon or exercise any powers or functions of the other.

Works on Courts and Their Jurisdiction, 183.

While the judicial department may exercise power to enforce the performance of merely ministerial duties by officers of the other departments, it never exercises jurisdiction to enforce or control action on the part of the other departments or their officers, where the exercise of judgment or discretion is called for.

United States v. Guthrie, 17 How. 284.
Brashear v. Mason, 6 How. 92.
Decatur v. Pawling, 14 Peter 497.
Marbury v. Madison, 1 Cranch, 137.

Mr. Works, in his book on Courts and Their Jurisdiction, on page 186, says:

> "It is the duty of the executive department of the government to enforce the laws. If the acts to be done in carrying the law into effect require the exercise of judgment or discretion, they are executive or political, and not ministerial, and can not be controlled by the courts. It makes no difference by whom an act is performed, whether by a ministerial, executive or judicial officer, in determining whether it is ministerial or not. The distinction depends upon the nature of the act done or to be done, and not upon the character of the officer by whom it is to be performed," citing Mississippi v. Johnson, 4 Wall. 475, and numerous other cases.

More than this, to enjoin the commissioners under the Act of March 10, 1900, is to enjoin the state. If, however, the exercise of jurisdiction in the case at bar be not open to any of these objections, we contend that in no case, and upon no principle approved by this court, has or can the jurisdiction be exercised in advance of the actual fixing of a rate. Until a rate is fixed, under the principles announced by this court in a number of cases, the question is not judicial. Until then, there is and can be no invasion or trespass upon the property or rights of another, or any taking or attempt at depriving another of his liberty or property without due process of law. As said in the case of Railroad v. Wellman, 143 U. S., supra:

> "The extent of judicial interference is protection against unreasonable rates."

It is not even alleged in the bills of complaint that the appellants intended or threatened to fix any specified rate, nor is it even alleged that they were attempting or threatening to make an unreasonable rate. The whole complaint is that if the appellants be permitted to exercise any of the functions delegated to them by the act, the appellees will be endangered. The allegations of the bill on this subject are as follows: (We quote from the bill of the Louisville Company, which is similar to the other bills, with the exception of the additional claim of impairment of contract.)

> "Defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroads in the state of Kentucky, for the purpose of considering whether or not they shall be altered and reduced in accordance with the terms of said act, and are giving it out in speeches and interviews that they intend to proceed at once under said act, and, unless restrained by the order of this court, defendants will proceed at once to hear and determine com-

plaints under said act, although the same is in contravention of the Constitution of the United States in all the particulars hereinabove set out, and is, therefore, null and void, and will proceed thereupon to reduce your orator's rates to such as they think your orator should charge, and will thereafter, at pleasure, modify and still further reduce the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the state of Kentucky for failing to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed, and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offense, and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted and heavily fined, to the great demoralization of the public service which your orator is bound to render; and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator's contract rights will be impaired, it will be deprived of its property without due process of law, denied the equal protection of the law, and subjected to great, irreparable wrong and injury, and to a vast multiplicity of prosecutions and actions in the courts of said state."

From these allegations there can not arise even a presumption that the appellants, as railroad commissioners, intended to do any unlawful act or to fix any unjust or unreasonable rate. On the contrary, until a rate is fixed, the court will conclusively presume that the officers of a co-ordinate branch of the government will perform their duty, as required by law.

The case nearest in approach to the case at bar is that of Stone v. Trust Company, 116 U. S. 307. In that case

suit was brought by the Farmers' Loan & Trust Company, in the Federal Circuit Court for the Southern District of Mississippi, to enjoin the railroad commission of that state from enforcing against the Mobile & Ohio Railroad Company the provisions of a statute regulating freight and passenger rates on railroads in that state, and creating a commission to supervise the same. That act, like the act of Kentucky now under investigation, gave the commission the power to investigate the charges and rates of the railroad companies, and, upon such investigation, to determine whether the railroads were charging more than a just compensation for their services, and further provided that the commission should establish a just and reasonable tariff of charges for the railroad companies. The act delegated to the commission the duty and power of seeing that the act was enforced, and that actions for the recovery of the penalties, and the infliction of the punishment provided by the act, should be instituted. Before the commission had established a rate, as appears from the opinion of the court, delivered by Chief Justice Waite, suit was brought in the circuit court to enjoin the enforcement of the act, on the ground that it was void, as a whole, for transgressing various alleged constitutional prohibitions, among them the violation of a contract right and the regulation of interstate commerce. In reversing the lower court, and speaking upon this phase of the case, the court said:

> "As yet the commissioners have done nothing. There is certainly much they may do in regulating charges within the state which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond. . . . . Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commis-

sioners from giving it any effect whatever as against this company. . . . When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid."

The question of the nature of the power exercised in enjoining the railroad commissioners does not seem to have been raised or considered in that case. There, as at bar, all of the complaint was speculative, but the court held that it would not indulge presumptions in favor of wrong action.

In the case of Spring Valley Water Works v. Schottler, 110 U. S. 347, the action was begun in the Supreme Court of the State of California for a writ of mandamus requiring the board of supervisors to take action and fill a vacancy in the board of commissioners for the purpose of determining the rates to be charged by the water company for water. It was claimed by the water company that by the Act of June 19, 1858, under which it was organized and erected its plant, it had a right to have the water rates fixed by a board of commissioners, to be selected, two by the city and county and two by the water company, nothwithstanding the intervening constitution which went into effect on January 1, 1880. On a writ of error to the Supreme Court of the state of California, this court, in an opinion delivered by Mr. Chief Justice Waite, in speaking upon the difference between the situation where rates have, and where they have not been fixed, said:

"What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record. The objection here is not to any improper prices fixed by the officers, but to their power to fix prices at all. By the Constitution

and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule. And here again it is to be kept in mind that the question before us is not as to the penalties to be inflicted on the company for a failure to sell at the prices fixed, but as to the power to fix the price; not whether the company shall forfeit its property and franchises to the city and county if it fails to meet the requirements of the Constitution, but whether the prices it shall charge may be established in the way provided for in that instrument. It will be time enough to consider the consequences of the omissions of the company when a case involving such questions shall be presented."

In Lake Shore v. Smith, 173 U. S. 684, this court, in an opinion delivered by Mr. Justice Peckham, holding to be invalid an act of the state of Michigan fixing maximum rates, and, in addition thereto, requiring the railroad to sell one thousand mile tickets to persons with a family, to be good for two years, at a rate reduced below that of the maximum, was careful not to be understood as asserting the doctrine that the courts assume jurisdiction to control legislative action. It is there said:

"The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest. . . . In holding this legislation a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of

> the laws, we are not, as we have stated, thereby interfering with the power of the legislature over railroads, as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public."

In Reagan v. Trust Company, 154 U. S. 367, the jurisdiction of the court was not sought until after the railroad commission had established a system of maximum rates, and it was then exercised wholly because it was proved that the rates were unreasonable and operated to deprive the railroads of their property. In that case the circuit court perpetually enjoined the commission from establishing other rates, and in this regard Mr. Justice Brewer, in delivering the opinion of the court reversing the judgment, said:

> "It follows from these considerations that the decree as entered must be reversed, insofar as it restrains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations; but must be affirmed so far only as it restrains the defendants from enforcing the rates already established."

In Smyth v. Ames, 64 Fed. 165, and 169 U. S. 466, the statute of Nebraska itself established certain classifications and certain rates, with power in the board of transportation to further reduce the rates and, under certain conditions, to allow them to be enlarged, but not to exceed a named limit. This court, in an opinion by Mr. Justice Harlan, stated that in view of the adjudications, among other principles, this must be regarded as settled:

> "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether

they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, can not be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. The cases before us directly present the important question last stated."

In that case both this court and the circuit court, presided over by Mr. Justice Brewer, in the trial of the case, were careful to frame the decree so as not to prevent the board of transportation from putting into effect the rates established by the act or permitted by it, when circumstances might so change as to make such rates reasonable and just to the railroads as well as to the public. In treating of this feature the court said:

"In anticipation, perhaps, of such a change of circumstances, and the exceptional character of the litigation, the circuit court wisely provided in its final decree that the defendants, members of the board of transportation, might, 'when the circumstances have changed so that the rates fixed in the said Act of 1893 shall yield to the said companies reasonable compensation for the services aforesaid,' apply to the court, by bill or otherwise, as they might be advised, for a further order in that behalf. Of this provision of the final decree the state board of transportation, if so advised, can avail itself. In that event, if the circuit court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute."

Afterward, in the same case, on an application for a rehearing, in 171 U. S. 361, the court said:

> "The court is of opinion that the present application by the appellants in each of the above cases should be granted. The general question argued before us on the original hearing was, whether the rates established by the Nebraska statute, looking at them as an entirety, were so unreasonably low as to prevent the railroad companies from earning such compensation as would be just, having due regard to the rights, both of the public and of the companies. In our examination of that question it was appropriate and necessary to inquire as to the earnings of the respective companies under the rates which they had established, looking at those rates, also, as an entirety. In this way we ascertained the probable effect of the statute in question. We did not intend, by an affirmance of the several decrees, to adjudge that the railroad companies should not, at any time in the future, if they saw proper, reduce the rates, or any of them, under which they were conducting business at the time the final decrees were rendered, nor that the state board of transportation should not reduce rates on specific or particular articles below the rates which the companies were charging on such articles when the decrees were entered. It may well be that on some particular article the railroad companies may deem it wise to make a reduction of the rate, and it may be that the public interests will justify the state board of transportation in ordering such reduction. We have not laid down any cast-iron rule covering each and every separate rate. We only adjudged that the enforcement of the schedules of rates established by the state statute, looking at such rates as a whole, would deprive the railroad companies of the compensation they were legally entitled to receive. We did not pass judgment upon the reasonableness or unreasonableness of the rates on any particular article prescribed by the statute or by the railroad companies. If the state should, by statute or through its board of transportation, prescribe a new schedule of rates, covering substantially

all articles, and which would materially reduce those charged by the companies, respectively, or should, by a reduction of rates on a limited number of articles, make its schedule of rates, as a whole produce the same result, the question will arise whether such rates, taking into consideration the rights of the public, as well as the rights of carriers, are consistent with the principles announced by this court in the opinion heretofore delivered. Of course, the reasonableness of a schedule of rates must be determined by the facts as they exist, when it is sought to put such rates into operation."

On the remanding of this case to the circuit court, acting upon this authority, the board of transportation gave notice and made orders directing various railroads to show cause why certain specific rates should not be, by a certain time, established. On an application for a temporary injunction (100 Fed. 235), and afterward appealed to the Circuit Court of Appeals (102 Fed. 197), where the case appears as Higginson v. Chicago, B. & Q. R. Company et al., Judge Thayer, speaking for the court, said, in denying the injunction:

"The orders which have been made by the state board of transportation are merely tentative. They do not establish a schedule of freight rates, and require the same to be put in force immediately, but simply direct the various railroad companies to show cause why certain rates should not be established. No reason is perceived why the companies against whom the orders run should be relieved by injunction of the duty of appearing before the board and disclosing to that public body the reasons which they may have to present why the board should not further proceed with the contemplated hearings, or why the proposed schedule of rates is unjust or unreasonable, if the board determines to proceed with the hearing. No harm can result to the appellants from taking such action, and a court of equity should not relieve them from the performance of that duty, un-

> less it clearly appears that the board of transportation, under existing laws, has no power to enter upon the hearing, or to consider whether existing rates are reasonable or unreasonable, or to make any orders with relation thereto."

In Railroad v. Minnesota, 134 U. S. 418, the rate had been established, and, upon writ of error, jurisdiction was assumed wholly upon the ground that the state court had refused to consider the reasonableness of the rate thus established, and as to whether it did or did not operate to deprive the railroads of the use of their property. It is decreed in that case that, while the courts have no concern with the fixing of a rate, they will exercise jurisdiction to determine whether a specific rate operates to deprive a person of property without due process of law, or denies to him the equal protection of the law, but that with the determination of this question the function of the court ceases. It will not enter into a consideration, either prospectively or retrospectively, as to what will be or what might have been a just and reasonable rate. It acts only on the question as to whether the rate complained of is just and reasonable.

In San Diego Land & Town Company v. National City, 174 U. S. 739, certain rates of a water company, fixed under the laws of the state of California, were alleged to invade the property rights of the plaintiff, as guaranteed by the Fourteenth Amendment of the Federal Constitution. In the opinion of the court, delivered by Mr. Justice Harlan, reviewing all of the rate cases, in speaking to the question of the extent of judicial interference in such matters, it is said:

> "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of

property for public use without such compensation as, under all the circumstances, is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulations, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use (citing cases). In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature, or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States, a judicial question arises, and the courts, Federal and state, must meet the issue, taking care always not to intrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law."

In L'Hote v. New Orleans, 177 U. S. 587, involving the right of the city of New Orleans to prescribe, by ordinance, limits within which the lewd women of the town should dwell, Mr. Justice Brewer, in delivering the opinion of the court, said, in reference to the manner in which the questions litigated were brought to the attention of the court, that:

"It is well, in the first place, to look at the negative side, and see what is not involved."

And to a claim that the establishment of the limits operated to put a pecuniary loss upon the property in and adjacent to the limits, said:

"The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of

this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character."

The case of Williams v. Mississippi, 170 U. S. 213, was, in its essential feature, not unlike the case at bar. In that case it was contended that the plaintiff was denied the equal protection of the laws of the state of Mississippi by a provision of the state Constitution and laws discriminating against colored persons in regard to their right to vote and sit upon juries. Many acts of discrimination were alleged in the bill as being possible of accomplishment under the law; but this court, upon writ of error, in an opinion delivered by Mr. Justice McKenna, held that such criticisms and possibilities of accomplishment did not operate to make the law invalid; that the law, on its face, did not deny to colored persons the equal protection of the laws, nor did it discriminate against them. Although the discretion which it vested in certain officers might be abused to the abridgment of the right of colored persons to vote and serve on juries, yet, before the court could take cognizance of this, it must be shown that the law, either upon its face, has such an effect, or that the actual administration of the law has such an operation.

In the case at bar, however, the act of March 10, 1900, operates to vest in the board of railroad commissioners only that power which is universally conceded to be within the exercise of the police power of the state, either directly by the legislature or through some other instrument. It can not be said that, in and of itself, it operates even to affect the railroads, much less to deprive them of any of their property or its use. This could not be approached until some rate is fixed, yet before this is done, and even without any claim that the law will certainly be misused or abused, these important functions of the state are suspended by injunction.

In the case of Trammel v. Dinsmore, 102 Fed. 800, the Circuit Court of Appeals for the Fifth Circuit, speaking through Circuit Judge McCormick, said:

> "The formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial, function. The courts are not authorized to revise or change the body of rates imposed by the commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. There can be no doubt of their power and duty to inquire whether a body of rates prescribed is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

In the case of Southern Pacific Company v. Board of Railroad Commissioners, 78 Fed. 236, Mr. Justice McKenna, then circuit judge, delivered an elaborate opinion, reviewing a multitude of authorities, and passed upon a multitude of questions with reference to the power of states, in the matter of the regulation of rates of common carriers and the powers of the courts to pass judgment upon the reasonableness of the rates fixed. In that case, as in all of the cases which have been reviewed by the Supreme Court, the jurisdiction of the court was not invoked or exercised until after a rate had been fixed. It was contended in that case, on behalf of the railroad commissioners, that they were not amenable to restraint from the court before a schedule was prepared and served, because its functions were legislative, and not after a schedule was prepared and served, because their legislative function had been discharged and their acts were law, the enforcement of which must be restrained, if at all, by suits against other officers than them. In that case, how-

ever, the statute expressly delegated to the railroad commissioners the power and duty not only of making and changing the rate and revising it, from time to time, but also the right, power and duty of enforcing their own orders and decisions, both directly, as far as power was conferred, and, in addition thereto, through the medium of the courts. (See the case, page 244.) In regard to enforcing the rate after it has been fixed, that case differs from the case at bar. According to our reading of the decisions, it is this function of enforcing the rate that has been fixed that makes the board or public officer charged with the duty amenable to the process of the court. In the case referred to, it was not necessary for the court to pass upon the power of the court to restrain the making of a rate, as that feature was not presented. In considering the argument, however, that was advanced, Judge McKenna uses this language, on page 245:

> "In support of this contention a great many cases have been cited and reviewed, which I need not comment upon. They, undoubtedly, decide that the purely legislative functions of any official body can not be controlled by the courts, but in the case of railroad commissioners the Supreme Court of the United States has distinguished executive from legislative functions, and has asserted the power to restrain the latter when their attempt is to enforce a tariff of rates which may be unjust and unreasonable."

And again, in quoting from the opinion of Mr. Justice Brewer, in the case of Reagan v. Trust Company, 154 U. S., and drawing a deduction therefrom, the opinion says, on page 246:

> "As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or re-arrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the

rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation.

"We are brought back to the inquiry concerning the duties which are devolved on the board of commissioners, and these, we have seen, are not only to enact provisions of regulation of rates, but to enforce them: and hence, certainly, when the former is done and the latter is threatened, the courts have power to review the regulation, and, to use Justice Brewer's words, 'condemn or sustain this act of quasi legislation.'"

In the case of Railroad v. Dey, 35 Fed. 866, the question was raised with reference to the rate law of Iowa as to whether the railroad commissioners could be enjoined from putting into force and operation the rate which they had made. It is there decided, by Mr. Justice Brewer, that enjoining the railroad commissioners from enforcing an unreasonable rate which they had established was not the equivalent of the exercise of the jurisdiction to restrain the prosecution of criminal laws, and that such a case was not within the principle of the case of ex parte Sawyer, 124 U. S. In that case, the jurisdiction was placed, as it has been according to our reading of all the cases, upon the ground that the railroad commissioners, in attempting to enforce an unlawful and illegal rate, were performing an unlawful act, to the invasion of the property and rights of the complainants.

We do not desire to be understood in the contention herein made as gainsaying any of these well-established principles, but contend that the case at bar is not within these rules, as the rate had not been fixed, and as the Kentucky railroad commissioners are not charged with the duty of enforcing the rate after it is fixed. They do have a continuous duty to perform with reference to the making of rates—that is, they are charged with the duty of changing it, from time to time, so that at all times it will be reasonable and just to both the railroad and the

public. This duty, however, we think, is purely legislative, or, at least, is so clearly allied to it that it should follow that a different department of the government, which has and can have no voice in the making of a rate, should not interfere.

The case of Southern Pacific v. Board of Railroad Commissioners, 87 Fed. 21, has some bearing upon this principle. In that case, allegations and charges were made, based upon what the board intended to do. In speaking to this point, the circuit court (Judge Morrow) there said:

> "The proceedings of the board in dealing with the resolutions appear to be, under the circumstances, relevant and material, but I can not see how the intention of the board can be considered relevant. The court will consider what the board did, but not what it or its members intended or threatened to do in the future."

In the case of Western Union v. Myatt, 98 Fed. 335, the Kansas law establishing a court of visitation and delegating to it the power to fix and regulate and enforce maximum rates for various public services, among them telegraphic services, was before the Federal Circuit Court. The main contention there was, on application for a temporary injunction, to prevent the enforcement of a schedule of rates alleged to be unreasonable, was as to whether all that was done or could be done under the act was absolutely void, because it attempted to confer upon a legislative body judicial power. The circuit court, in a well-considered opinion, held the law to be invalid, because it not only delegated to the board of commissioners legislative power, with reference to the making of rates, but created it a judicial tribunal, with full power to pass upon and enforce, as a court, what it had established as a rule of conduct. It is there decided that the function of such a board in establishing a rate is legislative, but that a

function in passing judgment upon and enforcing the rate which it has established by its own decrees is judicial, a confusion of power prohibited by the state constitution. On page 341, the court says:

> "The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered, is wholly a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or, however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property hights."

Again, on page 342, it is said:

> "Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing or prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our jurisprudence. Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct., 1047, 38 L. Ed. 1014; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed., 819. It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or quasi-public serv-

ice, because that is a legislative prerogative, and that the legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different."

And again, on page 360, in laying down the conclusions of the court:

"The distinction between legislative and judicial functions is a vital one, and it is not subject to change or impairment either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some subordinate board or agency, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction."

A similar conclusion was reached by the Supreme Court of the state in State v. Johnson, 60 Pac. 1068. In speaking of these duties as comprehending a delegation of legislative power, we do not desire to be understood to contend that there is delegated to such a board an absolute discretion as to what the law shall be. On the contrary, the law, as passed by the legislature, fixes absolutely the rule for the government of the board.

In the case at bar, the rule for the guidance of the board is that the rate fixed by it shall be just and reason-

able and shall prevent the exaction of extortionate rates by the railroads. When this rate is fixed, the rule, which before was uncertain, is made certain and definite. That such power is legislative, but yet may be conferred on an administrative board is universally conceded. In addition to the above cases on this point are:

> Tilley v. Railroad, 5 Fed. 658-9, and authorities there cited.

In that case, the contention was made that the delegation of power by the Legislature of Georgia to a board of commissioners to fix rates was void, but it was held to be not only a valid but the most convenient and satisfactory method of performing this function of government. See also:

> Starrs v. Railroad, 11 S. 227, 29 Fla. 617.
> Railroad v. Jones, 149 Ill. 378.

The only case brought to our notice where a court has exercised its jurisdiction to issue a writ of injunction against a board of railroad commissioners before the rate was fixed is:

> Louisville & Nashville R. R. Co. v. Railroad Com. of Tennessee, 19 Fed. 679.

In that case, the Tennessee law did not itself fix a schedule of rates, nor did it confer authority upon the railroad commission to fix a schedule of reasonable maximum rates which, if complied with, would protect the railroads, but provided that the railroad commission should have revisory power over the rates of all railroads and should give its approval to the rates, when found to be just and reasonable, and if unjust or unreasonable should determine what reduction was necessary to make them a reasonable compensation and should notify the company and enforce the reduction accordingly. The law further

provided that, notwithstanding the railroad should thus comply with the revisions of the commission, if the rate so revised was still unreasonable, the railroad should be subjected to the penalties pronounced by the statute. In that case, upon the giving of notice to the Louisville Company of the intention of the commission to revise its tariff, the bill was filed in the Federal Circuit Court, and a temporary injunction was granted. It does not appear from the opinion, either of Judge Baxter or Judge Hammond, in that case that the jurisdictional question here contended for was raised. The injunction as granted by Judge Baxter, principally on the ground that the entire act was void, because the rate established under it was not binding upon the commission or the state, through it, and, though it was to be observed by the railroad, it afforded the railroad no protection; that it discriminated against railroad corporations by imposing penalties not imposed upon other persons operating railroads, and discriminated in favor of railroads not completed; that it inflicted penalties without defining the offenses, and left to the juries to determine whether the difference in rates amounted to discrimination or whether the rates were unreasonable. The decision of Judge Hammond was mainly put upon the invalidity of the statute, because it was a regulation of interstate commerce. That case, however, is relied upon as a precedent to sustain the jurisdiction over the case at bar. It does not discuss nor decide the point here raised.

It may be contended by the appellees that the Kentucky commission should not be permitted to proceed, because the bills, which are taken as confessed, allege that any reduction upon the rates would make them unreasonable.

In this regard, the allegations of the bills are as follows:

> "All of your orator's rates charged, collected or received within the state of Kentucky, are just and

> reasonable, and have not been sufficient for many years to give it a fair return upon the reasonable value of its investment."

These and other allegations of like import do not come to the statement of any fact, but state only conclusions of law. Even if they could be treated as allegations of fact, and as alleging that the schedule of rates in vogue, as a whole, is just and reasonable, it does not follow that the particular items may not be regulated.

> Smyth v. Ames, 169 U. S. 466.
> Higginson v. Railroad, 171 U. S. 361.

In the case of Reagan v. Trust Company, 154 U. S. 362, where the answer was withdrawn by the commissioners and a demurrer interposed, but where the specific facts showing the unreasonableness of the rate appeared, this court, in addressing itself to the subject of pleading in such cases, said, on page 401:

> "It may not be just to take this as an allegation of a mere matter of fact, the truthfulness of which is admitted by the demurrer, and which, as thus admitted, eliminates from consideration all questions as to the true character of the effect of the rates, yet it is not to be ignored. . . . It would not, of course, be tolerable for a court administering equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the commission are unjust and unreasonable."

The court then proceeds to consider, in extenso, the specific facts shown in that record, which prove the schedule of rates fixed to be unreasonable.

Upon the principles of the cases which we have above cited we contend:

1. That the making of a rate for the government of those in the discharge of a public service is a legislative function, which can be discharged immediately by the legislature, or more appropriately by it through an administrative board, and that to enjoin the making of a rate is to deny to the state this power of control, which is universally conceded.

2. Where the administrative board merely makes the rate, but is not charged with the power of enforcing compliance with the rate after it is made, a suit against such a board or its members, is a suit against the state.

Interstate Commerce.

It is claimed in the several bills that the act of March 10, 1900, is absolutely void, because it applies to and regulates interstate, as well as domestic, commerce, and so mixes the two that one can not be separated from the other, and thus the whole act must fall.

It is not claimed that the act expressly attempts to regulate extra-state or interstate commerce, but it is contended that it has this result, because it does not expressly confine its operation to domestic commerce—that is, to such commerce as has its origin and destination wholly within the territorial limits of the state of Kentucky. The language of the act is:

> "When complaint shall be made to the railroad commission, accusing any railroad company, or corporation, of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad, in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission," etc.

Under well-recognized principles for the construction of a statute, and the hesitation which the judiciary always

have in annulling a legislative act, we think that the act, upon its face, and without the light of other acts governing the railroad commission, should be construed as applying only to that subject matter over which the state has jurisdiction, to wit, domestic commerce. Even if it were doubtful as to whether the legislative intent was to regulate interstate commerce, in advance of a determination by the state courts that it shall have such operation, the Federal judiciary will construe the act as applying only to domestic commerce. It must be presumed that the legislature, even by the use of the most general terms, did not intend to exceed its jurisdiction. This court said in Munn v. Illinois, 94 U. S. 113, that, "every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

The functions of a railroad commission were deemed of sufficient importance by the people of Kentucky to provide therefor in the Constitution of the state, adopted September 28, 1891. (The sections referring thereto will be found in the appendix to this brief, as will, also, the general provisions of the statutes governing the commission.)

When the Act of March 10, 1900, is read in conjunction with Section 826, Kentucky Statutes, previously adopted, it is made patent that it was not intended by the later act to regulate the rates upon anything but domestic commerce.

Section 826 reads as follows:

> "Said commission shall examine all through freight rates from points out of this state to points into this state; and whenever they find that a through rate charged into or out of this state is excessive or unreasonable or discriminating in its nature, they shall call the attention of the railroad officials in this state to the

fact, and urge them of the propriety of changing such rates. And when such rates are not changed, it shall be the duty of said commission to present the facts to the Interstate Commerce Commission, and appeal to it for relief, and they shall receive upon application the services of the attorney general of this state and into the condition, management and all other matters concerning the business of railroads in this state so far as the same pertain to the relation of such railroads to the public, and whether such railroad corporations, their officers and employes, comply with the laws of the state; and whenever it shall come to their knowledge, or they shall have reason to believe, that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporations or persons guilty of such violations."

By this section the duty of the commission, in reference to interstate commerce, was very clearly pointed out. The Act of March 10, 1900, was not intended to repeal Section 826. They are not inconsistent, but may stand together, as the full expression of the legislature's will as to the powers of the commission in reference to both interstate and domestic commerce.

Independent, however, of Section 826, it has been decided by this court that unless the state statute, upon its face, expressly relates to interstate commerce, or unless it has received a construction from the highest court of the state applying it to interstate commerce, it will be construed as relating to domestic commerce.

In the case of Stone v. Trust Company, 116 U. S. 307, it appeared that the commission law of Mississippi was much more indefinite than the Kentucky law. That law provided that any person or corporation engaged in transporting passengers or freight over any railroad in the state which should exact, receive or demand more than the rate provided for by the bill should be guilty of extortion. In holding this act not to be a violation of the in-

terstate commerce clause of the Federal Constitution, the court said:

> "It is not enough to prevent the state from acting, that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the state as well as within.
>
> "The commission is not, in express terms, prohibited by the Act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one state to another. The statute makes no mention of persons or property taken up without the state and delivered within, nor of such as may be taken up within and carried without. As to this, the only limit on the power of the commissioners is the constitutional authority of the state over the subject. Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of Congress and the general powers of the state in this particular is not everywhere distinctly marked; and it is always easier to determine, when a case arises, whether it falls on one side, or the other, than to settle, in advance, the boundary, so that it may be in all respects strictly accurate. As yet the commissioners have done nothing. There is certainly much they may do in regulating charges within the state which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

The case of Wabash Road v. Illinois, 118 U. S. 557, is very much in point as to the Federal interpretation of the Act of March 10, 1900, standing alone. In that case, the state statute indicated that:

> "If any railroad corporation shall charge, collect or receive for the transportation of any passenger or

> freight, of any description, upon its railroad, for any distance within the state, the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road. . . ."

it shall be deemed and taken as prima facie evidence of an unjust discrimination, prohibited by the act and for which a penalty was imposed.

This act was interpreted, by the Supreme Court of the state, to prevent such discrimination, though the longer haul traversed parts of the same road through other states.

Peoples v. Railroad, 104 Ill. 476.
Railroad v. People, 105 Ill. 236.

The state court was reversed on writ of error. In passing upon the proper construction of the act, however, if the court had been relieved of the state's interpretation, Mr. Justice Miller said:

> "It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state. The Supreme Court of Illinois having, in this case, given an interpretation which makes it apply to what we understand to be commerce among the states, although the contract was made within the state of Illinois, and a part of its performance was made within the same state, we are bound, in this court, to accept that construction."

In a subsequent case before the Supreme Court of Illinois, Railroad v. Jones, 149 Ill. 384, prosecuted upon the same statute, the contention was made that the statute was void, because of the decision in 118 U. S., supra. In passing upon this contention, the state court calls attention

to the fact that, in the judgment of the Federal court, the act was void simply because of the interpretation placed upon it by the state judiciary, and then explains how the state court was led into that interpretation by decisions leaving it to infer that the matter there involved was within the jurisdiction of the state in the absence of congressional action upon the subject, and the court then states that if the case then under investigation arose upon the same section of the statute it would be inclined to hold, in view of the decision of the Federal Supreme Court, that their previous decision was incorrect, and thus let the section stand as a valid and enforceable section, applicable alone to domestic commerce; but the court was not compelled to this, because it held that the section involved in the 118 U. S. case could be eliminated from the statute and the balance of it stand; and it then construes the other sections of the same act to apply alone to domestic commerce.

The presumption of the validity of a state act is always indulged. In fact, as often announced by this court, the most delicate duty which the court has to perform is to declare an act of a co-ordinate branch of the government to be unconstitutional. This will never be done, except in a plain and manifest case. Every inference and indulgence is to be made in favor of the constitutionality of a legislative act. Remedial laws are always liberally construed to accomplish the purpose of the law-makers. In reference to legislation concerning rates, this court has repeatedly said that it would not hold a rate established either by the legislature, or by a commission under its authority, to be in violation of the Fourteenth Federal Amendment, unless it was shown to the exclusion of a reasonable doubt that the rate so established operates to deprive the railroad of its property, or of the equal protection of the laws.

Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Smith, 173 U. S. 684.
Railroad v. Wellman, 143 U. S. 339.
Southern Pacific v. Board of Railroad Com'rs, 78 Fed. 236.

In the rate case of Railroad v. Tompkins, 176 U. S. 173, Mr. Justice Brewer, speaking for the court, said:

> "In approaching the consideration of a case of this kind, we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company, or the legislation of the state must be upheld."

Mr. Endlich, in his work on Interpretation of Statutes, Section 169, states the rule thus:

> "Another general presumption is that the legislature does not intend to exceed its jurisdiction. Primarily, the legislation of a country is territorial. The general rule is that extra territorium jus dicenti impune non paretur; leges extra territorium non obligant. . . . The presumption is that the legislature does not design its statutes to operate on them, beyond the territorial limits of its jurisdiction. They are, therefore, to be read, usually, as if words to that effect had been inserted in them."

A great number of decisions are cited to support the text.

The statute in question has not been interpreted by the Court of Appeals of Kentucky, and not by any state court, so far as we know. We submit, however, that on its face, and especially when construed, in pari materia, with the railroad commission statute, it is designed by the

legislature to apply only to domestic commerce, and that, even if there were a doubt upon the subject, that doubt must be resolved in favor of its constitutionality, in advance of a state interpretation, and be made to apply only to that over which the state has the right of government.

There seems to be an effort, however, in the bills of complaint, to charge that all of the commerce passing over the complainants' roads is interstate commerce. The charge is made that the railroads situated in Kentucky are but parts of other lines of railroad operated by the complainants, and further (we quote from the bill of the Louisville Company, pages 3, 4, which is a sample of the others):

> "Your orator carries a very large traffic over that part of its lines in the state of Kentucky, both passenger and freight, and both state and interstate, and about 80 per cent of such traffic passing over its lines in the state of Kentucky is interstate traffic in the strictest sense, and much of the remainder is virtually interstate traffic, the rates upon which have a direct and vital connection with the rates upon interstate traffic and a direct and far-reaching influence upon commerce among the states."

These allegations do not come to the point of denying that some part of the traffic of these roads is purely domestic commerce. We think that even if such an allegation were made, the court would take judicial cognizance that it must be essentially untrue. The Louisville Company is a corporation of Kentucky. The Henderson Company is a corporation of Kentucky, and begins and ends within the territorial limits of the state, and the Southern Company is a corporation of Kentucky. The allegations above quoted from the bills are evidently made with a view of attempting to bring all of the commerce upon the complainants' roads within the rule of

the case of Railroad v. Interstate Commerce Commission, 162 U. S. 184, and thereby to show that so much of said commerce, as has a connection with extra state lines of railroad through traffic arrangements and through bills, is within the control of the Interstate Commerce Commission, and, therefore, out of the control of the state commission. We deem it, however, not essential at present to consider the question, which sometimes becomes difficult of solution, as to where state commerce begins and interstate and foreign commerce ends, and the limitations and confines of each. These considerations, at present, would be but moot questions. They may become pertinent after the railroad commission has fixed a rate and the enforcement thereof is attempted. That there is an intrastate, or domestic, commerce, over which the state has control, is settled, we think, beyond further question.

Railroad v. Lander, 20 Ky. Law Rep. 913.
Railroad v. Mississippi, 133 U. S. 587; 5 L. R. A. 132.
Railroad v. Pennsylvania, 145 U. S. 192.
Tiedeman on State Control, 1056.
Plessy v. Ferguson, 163 U. S. 537.
Chesapeake & Ohio Ry. v. Kentucky, decided by this court in December, 1900.

This last case construed the separate coach law of the state of Kentucky providing for the separation of white and colored passengers into separate apartments to be constitutional. It was contended that this act was unconstitutional because, on the face of the act, the regulation was not confined to the territorial limits of the state and to domestic commerce. This contention was held to be well taken, in the Federal Circuit Court for the District of Kentucky, in the case of Anderson v. R. R., 62 Fed. 46. The terms of that act were more general than

the terms of the act on review in the case at bar, and did not expressly provide that such regulation should apply only to passengers taken up and set down within the territorial limits of the state.

The bills of complaint do not charge that there is not such a commerce which would be the legitimate subject matter of state control. That there may be an intimate connection between the state and interstate commerce, or that one may be effected by the other, is not sufficient.

In Stone v. Farmers Loan & Trust Co., 116 U. S. 307, this court distinctly held that although a road runs through several states, and forms a continuous line which is used for interstate commerce, it is none the less true that the corporation created by each state is, for all purposes of local government, a domestic corporation, and subject to regulation by the states respectively.

This court, in the cases of Smyth v. Ames, 169 U. S. 466, and Railroad v. Tompkins, 176 U. S. 167, and Reagan v. Trust Company, 154 U. S. 362, has decided that the state has a right to fix a rate for domestic commerce, but in doing so must fix it without relation to its intimacy with, or bearing upon, interstate or foreign commerce. The latter falls within the control of the national government, and the two must be kept separate and distinct. Each must bear its burdens and the reasonableness of its rate determined according to its own conditions.

In the opinion delivered by the circuit court, in the case at bar, it was held that the act could not be construed as applying to interstate commerce.

Judicial Power.

The complainants contend, and it was adjudged by the circuit court, that the act of March 10, 1900, is wholly invalid and in violation of the Fourteenth Amendment of the Federal Constitution, because,

1. It does not provide a judicial hearing for the rail-

road companies with reference to the rate which the commission is to fix; and,

2. The act confers upon the commission judicial powers, and the penalty of the rate to be fixed is the sequence of a judicial judgment that the railroad is guilty of extortion; and,

3. No sufficient notice to the railroad companies affected by the rate is provided for the fixing of the rate.

We do not think that any of these contentions is well taken. The contention that a judicial hearing is necessary to the fixing of a rate is based upon the authority of the case of Railroad v. Minnesota, 134 U. S. 418.

We do not understand that case to lay down this doctrine. Our interpretation of that case, and the cases which have followed it in this court, is, that the fixing or making of a rate is a legislative power, with which the courts have no concern, but that if a rate is made which is less than reasonable and just to the railroad, it amounts to an invasion of the property rights of said railroad, and violates the protection afforded by the Fourteenth Amendment. A rate unreasonable and unfair to a railroad comes, therefore, within the power of the judiciary whose peculiar function it is to protect property rights against such invasion. The doctrine of that case is that the courts do not concern themselves with the future regarding the rate, and will not, and have no power to, fix or make a rate, but that the reasonableness and fairness of a rate which has been made is the subject of a judicial investigation. The legislative department can not, by labeling a rate as fair and reasonable, deprive the court of the power of investigating the subject, and determining, for itself, that question. This is very far from reaching the contention of the complainants that a judicial investigation must precede the fixing of a rate. The doctrine of that case, as we understand it, is simply that the legislature has not the power to deprive the courts of an investigation, and that after a rate has been fixed, the

court may be appealed to and a trial may be had to determine its reasonableness, and a law which denies to a person the constitutional right to appeal to a court for such an investigation is, to that extent, unconstitutional and void. That case does not decide that, although the act may attempt to prevent such an investigation, if the courts of the state assume an investigation, the act would be declared void; but, on the contrary, it only holds that, where the courts of the state interpret the law and refuse to assert jurisdiction to investigate the reasonableness of a rate made, the Federal judiciary, on writ of error, will restrain the enforcement of the act as to the rate. In that case, a law of the state of Minnesota provided that all charges made by common carriers should be equal and reasonable, and all unequal and unreasonable charges were prohibited and declared to be unlawful, and, further, that each common carrier should print and copy for public inspection a schedule of the charges, which it had established, no more nor less than which schedule it should charge, and that this schedule could be changed only upon ten days' notice; and that it should also file copies of its schedule with the commission and should notify the commission of all changes, and that the commission should have the power, at any time, to change any part of the tariff or charges, so filed or published, found by it to be in any way unequal or unreasonable, and in such case should make, for the carrier, what it deemed to be a just and reasonable rate, and that this rate should be adopted, by the carrier, and no more and no less charged, and upon the failure of the carrier to put into force such a rate it should be subject to a writ of mandamus, to be issued by any judge of the Supreme Court, or of any district court, upon application of the commission, to compel compliance with the requirements of the act. The commission fixed a rate for the Chicago, Milwaukee & St. Paul Railway Company, the plaintiff in error, touching its milk traffic between

certain points, and upon its refusal to adopt the rate an action for a writ of mandamus was brought under the provisions of the act. In answer to the petition for the writ, the railroad responded, among other things, that the rate which the commission had fixed was unreasonable and amounted to a taking of its property without due process of law, and a violation of the guaranties of the Fourteenth Amendment. It was adjudged, by the Supreme Court of the state (38 Minn., 281), that the answer was insufficient; that the reasonableness of the rate was the subject of legislative, and not of judicial, investigation, and that the court had no power to go behind the finding of the commission. Upon writ of error to this court, it was held, Messrs. Justice Bradley, Gray and Lamar dissenting, that the question as to whether the rate was, or was not, reasonable was a judicial question, after the rate had been fixed, and that to deny such an investigation and enforce against a railroad an unreasonable rate, was a violation of the guaranties of the Fourteenth Amendment. It was not, however, ruled, nor, as we read the case, even intimated in any of the opinions, that the act was objectionable because it did not expressly provide for a judicial hearing, after the rate was fixed. On the contrary, the contention made in that case was that, under the act, what was tantamount to a judicial hearing was held by the commission before the rate was fixed, and that this was sufficient; but in answer to that contention this court held that the commission was an administrative board, and not a court, and that the provision for hearing, before the commission, with reference to the fixing of a rate, was not the equal of a judicial investigation, as to the reasonableness of the rate, after it had been fixed. Nor did this court, in that case, interpret the Minnesota statute as denying, or intending to deny a judicial hearing. On the contrary, in remanding the case, this court was careful to say that if the Supreme Court of the state would set aside its

ruling and admit the answer of the railroad, and afford it a judicial investigation, as to the reasonableness of the rate, the mandate of the court would be complied with. The language of the opinion of Mr. Justice Blatchford, speaking for the majority, is:

> "In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceedings for a mandamus, if the court should adhere to its opinion that, under the statute, it can not investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review; and *the judgment of this court is, that the judgment of the Supreme Court of Minnesota, entered May* 4, 1888, *awarding a peremptory writ of mandamus in this case, be reversed and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.*

Again, in speaking of the action of the state court in refusing to hear the defense pleaded, Mr. Justice Blatchford said:

> "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter, in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, can not be regarded as clothed with judicial functions, or possessing the machinery of a court of justice."

Mr. Justice Miller, in a concurring opinion, set out his views in the form of ten propositions. The power of the legislature to exercise its function of fixing a rate, through a commission, was conceded, in the first and second propositions, and the balance of the opinion is, as follows:

"3. Neither the legislature, nor such commission acting under the authority of the legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law.

"5. But until the judiciary has been appealed to to declare the regulations made, whether by the legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

"6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

"8. But in the present case, where an application is made to the Supreme Court of the state to compel the common carriers, namely, the railroad

companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery.

"9. I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the legislature to have given such notice if it had established such rates by legislative enactment.

"10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void."

This opinion of Mr. Justice Miller is quoted, in part, and approved by this court, speaking through Mr. Justice Shiras in the case of St. Louis & San Francisco Railway v. Gill, 156 U. S. 649.

As we understand these propositions, it is established that a judicial hearing is not necessary to precede the fixing of a rate, and that, in fact, the rate can be fixed without any notice or hearing, whatever. Nor is it intimated that the act must expressly provide that a judicial

hearing may be had after the rate is fixed. On the contrary, the courts have jurisdiction to grant this hearing by virtue of the Fourteenth Amendment and without any express grant of power by legislative act. It would result, therefore, that if nothing is said in the act, the courts of the state possessing equitable jurisdiction, like the circuit courts of the United States, would have jurisdiction to entertain a bill to restrain the commission from the enforcement of an unreasonable rate and, in such action, to investigate the reasonableness of the rate that was being enforced. It is moreover established by the third proposition that the rights of the railroad and the public with reference to the rate are correlative, and that the rate must be reasonable and just to both; that the public has as much right to complain of an unreasonably high rate, as the railroad has of an unreasonably low rate. It is further established that the question of the reasonableness, or unreasonableness of a rate can not arise until after the rate has been fixed. It then becomes, for the first time, a judicial question, to be determined by the courts. Mr. Justice Bradley dissented on the ground that the matter was wholly legislative, and that due process of law was satisfied in such matters, through legislative functions, and did not require the exercise of judicial functions, and that the courts were bound by the rate fixed. Mr. Justice Lamar and Mr. Justice Gray concurred with Mr. Justice Bradley in this view. All of the opinions agree, that neither notice nor judicial hearing is necessary to the fixing of a rate. There is no subsequent decision of this court, to which our attention has been called, laying down a contrary doctrine.

In the case of Fitts v. McGhee, 172 U. S. 516, it was held that a law of the state of Alabama fixing a toll rate for the Florence Bridge was not invalid or unconstitutional, and did not operate to confer even jurisdiction upon the Federal courts in advance of action in the state courts, because it provided for no judicial hearing as to

the rates fixed by the act. In that case it was decided that the proper method of raising all defenses under the Fourteenth Amendment was by pleading to indictments in the state court, or in the other penal actions that were brought, the unreasonableness of the rate, and that after testing the matters through the state court, a writ of error for review would lie from the Supreme Court of the United States; but that in advance of such procedure, although it might be convenient, no action in equity could be brought in the Federal Circuit Court. That the courts do not exercise jurisdiction regarding the making of a rate, but only assume jurisdiction as to the reasonableness of a rate that has been fixed and is complained of, is well established by the adjudications of this court.

Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Lake Shore v. Smith, 173 U. S. 684.
Railroad v. Gill, 156 U. S. 664.
Railroad v. Wellman, 143 U. S. 339.
Railroad v. Blake, 94 U. S. 180.
Munn v. Illinois, 94 U. S. 113.
Stone v. Trust Company, 116 U. S. 307.

These authorities all establish the proposition that the fixing of a rate is not judicial, and that a court, even in passing upon the reasonableness of a rate fixed, will not assume jurisdiction to say what would be a reasonable rate. The extent of the judicial power is to decide whether or not a rate which has been fixed and is complained of is reasonable.

The case of Budd v. New York, 143 U. S. 517, left a doubt as to whether there was some possible distinction between a rate fixed by the legislature and a rate fixed by a commission authorized by it, but this was soon dissipated; and the doctrine, as now firmly established, is that there is no distinction.

Railroad v. Gill, 156 U. S.
Reagan v. Trust Company, 154 U. S.
Smyth v. Ames, 169 U. S.
Lake Shore v. Smith, 173 U. S. supra.

Thus in the late case of Chicago, Milwaukee & St. Paul Railway Company v. Tompkins, 176 U. S. 167, court and counsel assumed the existence of the power in the legislature to fix rates through a commission. Under the law the commission made a schedule of rates, and the bill seeking to enforce the schedule was immediately filed. The sole ground for relief was the unreasonableness of the rates fixed by the commission. There was no question raised as to the authority of the commission to act. It may fairly be concluded from this that the doctrine is firmly established that the power which the legislature has to fix the rates for carriers may be exercised by it directly through an act, or indirectly through a commission created for the purpose.

As hereinbefore noted, in the case of Railroad v. Wellman, 143 U. S., Mr. Justice Brewer, delivering the opinion of the court, said:

> "The legislature has power to fix the rate for railroad charges for the transportation of passengers, and the extent of judicial interference is protection against unreasonable rates."

In Smyth v. Ames, 169 U. S. 528, this court, in an opinion delivered by Mr. Justice Harlan, said:

> "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, can not be so conclusively determined by the legislature of the state, or by regulations

adopted under its authority, that the matter may not become the subject of judicial inquiry."

To the same effect, see

Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Gill, 156 U. S. 664.
Railroad v. Blake, 94 U. S. 180.
Munn v. Illinois, 94 U. S. 113.
Lake Shore v. Smith, 173 U. S. 684.
Stone v. Trust Company, 116 U. S. 307.
Starrs v. Railroad, 11 S. R. (Fla.), 226.
Georgia Railroad v. Smith, 128 U. S. 174.
Dow v. Beidelman, 125 U. S. 680.
Budd v. New York, 143 U. S. 517.
Lexington Turnpike v. Sandford, 164 U. S. 578.

In Railroad v. Gill, 156 U. S. 648, on writ of error to the Supreme Court of the state of Arkansas, where the legislature fixed the rate, in speaking to the question of a judicial hearing on the rate fixed, this court, in an opinion delivered by Mr. Justice Shiras, said:

"Sometimes, in acting on this subject, the state legislatures have created commissions of board of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity, or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining, can be protected. But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to re-

spond and, therefore, if the companies are to have any relief, it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

In that case the act did not provide for any judicial hearing. The railroad answered, alleging special facts, which it claimed operated to show that the rate fixed was unreasonable. A demurrer to this was sustained by the state court, and the railroad afterward offered to prove special facts to the same purport, but to which an objection was sustained. It did not thus appear that the state court had refused to receive a competent answer, or competent proof, going to sustain the defense of unreasonableness of rate, yet this court did not hold that such action by state authorities was a denial of a judicial hearing. On the contrary, this court held that neither the answer nor the proof offered to show that the rate was unreasonable, and concluded as follows:

"Upon the whole, we do not feel warranted, by all that appears in this record, in declaring invalid an act of the Legislature of Arkansas, which, on its face, appears to be a legitimate exercise of power, and which has not been shown, by clear and satisfactory evidence, to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error."

In the case of Stone v. Trust Company, 116 U. S. 307, known as the Mississippi Railway Commission Cases, this court held that in the absence of a direct provision in the statute invading some constitutional right or privilege, the court would presume that the state authorities would obey the law, and would give the act such operation as would comply with constitutional limitations.

In Smyth v. Ames, 169 U. S., followed by Higginson v. Railroad, 171 U. S. 361, and in Reagan v. Trust Company, 154 U. S., this court, in passing upon the reasonableness

of a rate which had been fixed, limited its authority to pass upon the schedules of railroads, as a whole, and so framed the decree as not to prevent the state, or its commission, from fixing or making other rates, or from making rates as to particular items.

In Railroad v. Nebraska, 170 U. S. 57, in regard to apportioning against railroads, the costs of constructing and maintaining a railroad crossing, where it was claimed that the apportionment was invalid because made without notice, this court, in an opinion delivered by Mr. Justice Shiras, said:

> "Again, it is said that the apportionment made by the ordinance of the extent of the repairs, one-third to the plaintiff in error and two-thirds to the Union Pacific Railway Company, was arbitrary, without notice, and contrary to plain principles of justice and equality. But if, as we have seen, it would have been competent for the legislature to have put the burden of these repairs upon one of the parties, or to have apportioned them among the parties, as it saw fit, so it may make a due apportionment through the instrumentality of the city council. The latter was not directed to proceed judicially, but to exercise a legally delegated discretion."

In support of this, the opinion cites and quotes from the cases of

> State v. Railroad, 33 Kan. 176.
> N. Y. Health Dept. v. Trinity Church, 145 N. Y. 32.

In San Diego Company v. National City, 174 U. S. 740, it was contended that the state laws authorizing water rates to be established without previous notice to the corporation or persons immediately interested and without hearing, in any form, was invalid, because repugnant to the Fourteenth Amendment of the Federal Constitution,

and reliance for this position was mainly put upon the case of

Railroad v. Minnesota, 134 U. S.

In that case the law provided the time when the rate should be fixed. It was held in that case (Mr. Justice Harlan delivering the opinion of the court), that a hearing was not essential, but that as the statute fixed the entire month of February in each year as the time when the rates should be fixed by the municipal authorities, it was the duty of the water company to make its complaint, and that this was sufficient notice. In treating of this subject the opinion says:

> "If the state, by its Constitution or laws, had forbidden the city or its board to receive or consider any statement or showing made by the appellant touching the subject of rates, a different question would have arisen."

In that case, in the Federal court, the rate that was fixed was impugned. On this subject this court said, at the conclusion of the opinion:

> "It is sufficient to say that upon a careful scrutiny of the testimony our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by the defendant's ordinance, looking at them in their entirety—and we can not properly look at them in any other light—are such as amount to a taking of property without just compensation, and, therefore, to a deprivation of property without due process of law."

In the case at bar the act does not preclude the complainants from being heard with reference to any rate that is to be fixed. On the contrary, it provides expressly that the railroad, whose rate is being considered, shall be notified and heard. The complaint of the bills, how-

ever, is that because the act provides that the notice may be served upon any officer or agent or employe that this is tantamount to no notice. The bills charge that a notice might be served upon a brakeman or switchman. This complaint, we think, is not germain to any of the cases now under consideration. In none of the bills do the complainants allege that with reference to the present proceeding of the board any notice has been served upon a brakeman or a switchman. On the contrary, each of the bills concedes the service of a notice upon a proper officer. At least, the notice that the commission would proceed was of sufficient character to precipitate the filing of the bills before the commission took any action. It is averred in each of the bills that the commission has "called for and obtained from your orator a list of rates fixed and charged by it." (See page 10, Louisville case.) A notice, in any form, is not essential, as the procedure in fixing a rate is legislative, and not judicial; but if a notice were necessary, we think it will be time enough to consider the objection that a notice might be served upon a brakeman when such service is made, and by virtue thereof the rate is fixed and complained of. If notice were required, and the statute permitted the latitude of notice charged in the bills, we think it is well established that the court would hold as void a notice served upon an officer, or an agent of such inferior grade, as not to amount to notice to the corporation; but would not, therefore, hold the entire act unconstitutional, or hold as unlawful proceedings upon proper service. The provisions of an act permitting such unlawful service could readily be removed from the act without impairing the operation of the remainder. Notwithstanding that the act might provide for fixing rates upon an insufficient or unreasonable service of notice, yet, if it should appear that the service of notice had been reasonable and sufficient, before action taken, in such a case the company would be estopped to complain on this ground. The shadowy as-

sumption that the commission may serve notice on a brakeman is not sufficient to justify the court in holding the law unconstitutional.

In Railroad v. Bristol, 151 U. S. 556, this court held that it can not proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved. The contention, however, of the complainants is that there is some natural right to a judicial hearing with reference to the fixing of a rate.

In Reagan v. Trust Company, 154 U. S. 395, this court said:

> "Courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carrier and the shippers; they do not engage in any mere administrative work."

Again, on page 400, it was held:

> "As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule, or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi-legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this."

Again, in that opinion, it was held that the object of the legislature was the creation of a commission with power to fix rates, and that this was accomplished, whether the rates fixed were held conclusive or only

prima facie; that the provisions with reference to the penalty complained of as rendering the act unconstitutional might be dropped from the statute without affecting the validity of the remaining portions.

It is further contended by the complainants that the Act of March 10, 1900, in not providing expressly that the reasonableness of the rate fixed may be made the basis of a defense, to any indictment or proceeding had under the statute, virtually provides that the rate fixed shall be conclusive, and shall not be inquired into. As we have before seen, however, such a presumption, rendering the statute unconstitutional, will not be indulged. The statute does not so provide. It was not necessary that the statute should contain any provision on this subject. Its silence leaves the matter open to the full operation, through the judiciary, of all of the constitutional provisions, if the commission, in fixing the rate, should attempt their violation. In the absence of a direct provision that the rate fixed shall be conclusive and binding and not inquired into, the rate itself is prima facie evidence of its reasonableness. This much is indulged, out of that respect which one department of the government bears toward a co-ordinate department. If the act in question had, therefore, expressly provided that the rate, when fixed, should be only prima facie evidence of its reasonableness, there would be no ground for this contention, on the part of the complainants, yet, as we think, the absence of any statement on the subject has this operation and effect.

See Tiedeman on State and Federal Control of Persons and Property, Volume 1, page 313, and cases above cited.

Again, it is contended, and was so ruled by the circuit court, that the Act of March 10, 1900, confers upon the railroad commission judicial powers; that the commission first organizes as a court of justice, tries the railroad on a charge of extortion, and, if it should find the railroad

guilty, inflicts, as a penalty, its judgment making a reasonable rate—in the language of the opinion of the circuit court (page 24, record Louisville Company):

> "The legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an offense and lower its rates alone, as the penalty of such conviction. The most prominent feature of this legislation is the manifest purpose, if possible, to regulate rates by severe punishments for single offenses, rather than by means of real attempts to solve the immense problem of fair and reasonable freight and passenger charges by industrious and earnest efforts to ascertain what they should be."

It would seem from the opinion that the objectionable feature of the act is that it requires the commission to investigate the matter of rates before it fixes a rate, at least, a commendable feature in both a legislative and administrative board, as shown by all the decisions. On the one hand, the contention seems to be that the act is void because it does not give a judicial hearing and notice in the fixing of a rate; and, on the other, that it is void because a trial precedes the fixing of a rate. It is not true that only judicial bodies exercise the functions of investigation and judgment. All legislation involves these classifications, and many executive, and even ministerial, acts require them. Any trial or investigation that precedes the making of a rate can not be a judicial investigation, within the meaning of the law, because it is an investigation looking not to an effect upon the past, but to the making of a rule for future conduct. Without reiteration, this distinction is established in all of the cases, many of which have heretofore been cited.

In the case of Western Union v. Myatt, 98 Fed. 341, heretofore cited, the rate act of Kansas was held to invade the Constitution, because it conferred upon the court of visitation, created by the act, as a judicial body,

legislative functions. In that case the court, in defining this distinction, said, on page 341:

> "In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the Constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then, whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction. As applied to this case, the power of the state to fix or limit the charges of telegraph companies for transmission and delivery of telegraphic messages, is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law, and a denial of the equal protection of the laws, and, therefore, violative of the first section of the Fourteenth Amendment to the Constitution, is a question for the courts."

And again, on page 345:

> "It was argued, at the bar, on behalf of the defendants, that the powers conferred upon the court of visitation are judicial in their character, for the reason that the law contemplates an investigation and consideration on the part of the court before final action is had; and it is particularly recalled

that such contention was made with reference to Paragraphs 8 and 9 of Section 8 of the act, which authorize the court of visitation to 'prescribe rules concerning the movements of trains to secure the safety of employes and the public, and to require the use of improved appliances and methods to avoid accidents and injuries to persons.' Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice. It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and opinions of men having special knowledge of matters to be effected by proposed legislation constitute, in any sense, the exercise of judicial functions, or that such committees are judicial tribunals. Nor does it follow that, because the exercise of the powers conferred upon the court of visitation requires the use of judgment and discretion, such powers are judicial in their nature, as that would make every executive act and legislative act, requiring judgment and discretion, a judicial act."

To the same effect was the subsequent decision of the Supreme Court of Kansas upon the same subject, in State v. Johnson, 60 Pac. 1068. In that case, Mr. Justice Johnson, in an able dissenting opinion, reviewing a great many authorities, held that the Kansas act did not create what is called the court of visitation, a judicial court, but made it only an administrative body, with quasi-judicial power, pertinent to confer upon such a body. Whatever may be said of the conflicting opinions regarding that statute, and as to whether judicial power was or was not conferred upon the board, it is sufficient to say that it radically differs from the statute now in question. Under the Kansas act, the board was, in every essential feature, constituted as a court with power to enter judgments, and to enforce its own judgments by sequestration of property and appointment of receivers.

In Railroad v. Board of Commissioners, 78 Fed. 258, heretofore referred to, the circuit court, speaking through Mr. Justice McKenna, said:

> "The objection that the provision of the California Constitution creating the board of railroad commissioners is invalid, because they do not require notice to the railroads, is certainly doubtful as law, if it be not disputable as a correct interpretation of those provisions."

Then, after reviewing the Minnesota case in 134 U. S., and holding that the majority opinion in that decision does not warrant such an inference, and that the concurring opinion of Mr. Justice Miller holds expressly that notice is not necessary, it continues, on page 260:

> "These views seem to satisfy all the purposes of the state, and all the rights of the railroads. The commission undoubtedly exercises a function which the legislature would otherwise exercise. It should be as full with the commission as with the legislature, and, in both, subject to the same judicial investigation, as we have already seen it is, and thereby giving to the railroads that protection to their rights and property which the constitution guarantees."

It was further held, in that case, in answer to the contention that the act was void because it did not provide for the fixing of reasonable rates, that in the absence of the word "reasonable," as a qualification of the rate to be fixed, the court would infer that the legislature intended reasonable rates.

In the case of Railroad Company v. Trammel, 53 Fed. 197, where the state law provided that the rate fixed should be *sufficient* evidence of its reasonableness, when questioned, it was held that in advance of state decisions denying the complainant an investigation on this subject,

the Federal court would not presume that the legislature meant to prevent judicial investigation.

The Interstate Commerce Commission, under the Act of Congress of 1887, is vested with many functions more nearly approaching judicial functions than any possible legislative function of fixing a rate, and yet that body has been held not to be a court, and not to possess the legislative power of fixing a rate.

Railroad v. Interstate Commerce Commission, 162 U. S. 184.
Interstate Commerce Commission v. Railroad, 167 U. S. 507.
Interstate Commerce Commission v. Railroad, 168 U. S. 144.

The investigation which the Kentucky commission is to hold, under the Act of March 10, 1900, is for the purpose of informing itself, so that a just and reasonable rate may be made. It proceeds in the same manner that a legislative committee would in ascertaining the facts necessary to enable it to act intelligently. It is not for the purpose of entering a judgment convincing the railroad of extortions, and then fixing a rate as a penalty. The only penalty which it can inflict, by the terms of the act in question, is the fixing of a reasonable rate. Of this the railroad companies have no legal right to complain. The interpretation of the act sought seems to us to be unwarranted. At least, under every state statute, as well as under the Act of Congress, where a railroad commission is organized and invested with the power of enforcing, fixing or regulating rates, it is also invested with power to investigate and hear evidence, and to inform itself, and is generally required so to do. Under none of the cases is the commission required to fix a rate simply for the purpose of fixing it. It will not be presumed that the commission will attempt to enforce the law so as to destroy or cripple the company. Under most

of the acts, where the act itself does not provide the rate, the commission is not authorized to make the rate or change it, except when the railroad is violating the conditions of reasonableness and fairness, in the tariff which it exacts.

In the opinion of Interstate Commerce Commission v. Railroad, 167 U. S. 493, Mr. Justice Brewer collated the provisions of the acts of many of the states touching upon this subject.

In State v. Wilson, 28 S. E. 554, it was held that the railroad commission, under the law of North Carolina, was not a court and did not have judicial powers, although the procedure much more nearly resembled a judicial procedure than that called for by the Kentucky act. In that case the court said:

> "Our conclusion is that the railroad commission does not stand upon the same footing as the criminal courts, inasmuch as it is an administrative, and not a judicial, court. While it was made by a subsequent statute a court of record, it was clearly the object of the act simply to give authenticity to its records and proceedings, as it added nothing to its duties or powers. It has been held to be a court of record in Atlantic Exp. Co. v. Wilmington & W. R. Co., 111 N. C. 463, 474; 16 S. E. 394; but, in the opinion of the court delivered by Chief Justice Shepherd, appears the significant qualification: 'Whether a court, having no power to enforce its judgment, fulfills the definition of a court of record and of general jurisdiction, is unnecessary to be considered.' The Supreme Court of the United States, in Reagan v. Trust Co., 154 U. S. 362, 397; 14 Sup. Ct. 1047, citing the Railroad Commissioner Cases, 116 U. S. 307; 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, says: 'There can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroads or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board, created by the state for carrying into

effect the will of the state, as expressed by its legislature.'"

It is contended and intimated in the opinion that possibly the Act of March 10, 1900, was the result, or influenced by the decision, of the Court of Appeals in Louisville & Nashville Railroad Company v. Commonwealth, 99 Ky. 132, decided April 4, 1896. In that case the railroad was indicted and found guilty, in the trial court, of extortion, under Section 816 of the Kentucky Statutes, which reads as follows:

> "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this state, it shall be guilty of extortion."

On appeal to the Court of Appeals, the judgment of conviction was set aside, and this section was held unconstitutional, because, in the opinion of the court, until the state had fixed a reasonable rate, the railroad companies had no definite and certain standard according to which they could mould their conduct. It was held that while the common law and the statute fixed the rule at reasonableness, this was too indefinite and uncertain a rule to base a penal action upon—one jury might consider that reasonable which another jury might consider unreasonable.

The case of Railroad v. Dey, 35 Fed. 866, decided by Mr. Justice Brewer, was referred to in the opinion as being similar to the case then before the court, except that in the Federal case a schedule of rates had been fixed as reasonable, thus giving a certain standard for the guidance of the railroads.

The circuit court, in the case at bar, intimates that

the Act of March 10, 1900, is obnoxious, because it confers upon the railroad commission the power to fix the standard wanting in the section declared to be unconstitutional, and for this reason the act confuses judicial and legislative or administrative functions.

We confess that we are at a loss to reach the conclusion, even assuming the premises to be true.

It is again contended, and was held by the circuit court, that the Act of March 10, 1900, violates Sections 27 and 28 of the state Constitution, which provides as follows:

> "Sec. 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.
>
> "Sec. 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The Constitution also expressly provides for and creates the railroad commission, as shown by the sections printed in the appendix.

Section 218 of the Constitution, and Section 820 of the Kentucky Statutes, providing a penalty for charging a greater rate for a short haul than a long haul, under certain conditions, give to the railroad commission power to relieve the carrier from the operation of the section in special cases. This can only be done after a hearing and investigation, as extended and full as the commission deem necessary. We have here, by constitutional provision, so far as the state is concerned, a delegation of a power upon the railroad commission more nearly approaching judicial functions than any conferred by the

Act of March 10, 1900. The provisions regarding the long and short haul were enforced by the Court of Appeals in the case of Louisville & Nashville R. Co. v. Commonwealth, 46 S. W. 707.

As a Constitution can not be repugnant to its own provisions, it would seem that the Act of March 10, 1900, is not open to the objection that the railroad commission may discharge powers quasi-judicial in their nature.

Since Kentucky has existed as a state, county courts have discharged powers, both purely judicial and purely executive. Notwithstanding Section 28 of the Constitution, the county court, eo nomine, is created by the Constitution, and is vested with a mixture of such powers.

See Pennington v. Woolfolk, 79 Ky. 13.

In Stone, Auditor, v. Wilson, 19 K. L. R. 126, overruling Commonwealth v. Adams, 95 Ky. 589, it was held that a legislative act conferring upon the courts the authority to fix the fees to be received by certain executive officers, was not unconstitutional for the reason that it was an attempted delegation of legislative power to a judicial tribunal.

In Morton v. Woodford, 99 Ky. 367, it was held that the delegation of a power to a circuit court to establish towns under certain conditions is not a violation of the above provisions of the Constitution.

We, therefore, contend:

1. That the powers conferred upon the railroad commission by the Act of March 10, 1900, are purely legislative, or, at least, quasi-legislative, and that the nature of these powers is not changed because investigation and knowledge must precede their execution.

2. That it was not necessary, for the fixing of a rate or the discharge of any of the powers conferred under the act, that any notice should have been given to the railroads affected, but that the requirement of notice does

not render the performance of the functions unconstitutional.

3. If notice be required to render the statute constitutional, such notice is expressly provided by the act, and the fact that, in its latitude, notice may possibly be served upon some person, which would not be sufficient to give a court judicial power, can not operate to render the entire act unconstitutional. In such event, the act would only be unconstitutional when it was enforced through an invalid notice.

4. A judicial hearing is not required by any provision of the Federal Constitution to precede or attend the making of a rate.

5. The absence of an express provision in the act that the rate, when fixed, shall not be conclusive, or that the party charged with an observance of the rate shall have the right to appeal to the courts for relief against an unreasonable rate, is not necessary, and does not render the act unconstitutional. The absence of such a provision reads the Constitution into the law itself.

Arbitrary Power and Discrimination.

The next contention of the complainants is that the Act of March 10, 1900, is unconstitutional and void, as a whole, because it confers upon the railroad commission arbitrary power, especially in the fact that under it the commission may establish a rate upon particular articles and for each separate road. The act will permit different rates to be established by the commission against different railroads, but the commission, under the act, is not compelled to establish different rates, nor is it compelled to proceed against one road alone with reference to the establishment of a rate. From the bills it appears that it has made the same demand for schedule of rates from each of the complainants. This is doubtless a preliminary step to investigate all the rates alike. The act

makes it the duty of the commission to investigate specific complaints made as to rates, but at the same time gives to the commission the right to proceed, of its own motion, whenever it has information, or even reason to believe that the rate or rates which are being charged are extortionate.

It must be observed, however, that the aim of the act is to prevent extortion, and the limitation of the power conferred upon the commission is to make a rate which will be reasonable. The commission has no power to make an unreasonable rate, and we believe that the making of such a rate would be in violation of the express provisions of the act, in this regard protecting as fully the rights of the railroads as of the public. While a different rate may be established against different roads, the rule for the making of a rate is equal and uniform—that is, in every respect it must be reasonable. What may be a reasonable tariff for one railroad might be exorbitant for a second, and wholly insufficient for a third, under the rule established by this court in the cases of

Reagan v. Trust Company, 154 U. S. 362.
Smyth v. Ames, 169 U. S. 466.
Railroad v. Tompkins, 176 U. S. 167.
Turnpike v. Sandford, 164 U. S. 578.

If the law is equal and uniform, and applies to all falling within the same class, it is not, according to our understanding of the cases, open to the objection that it confers arbitrary power or unjustly discriminates against individuals, or violates the equality clause of the Fourteenth Amendment, even though, in its execution, differences may occur. If there were no statute on the subject, but the matter were left to the operation of the common-law rule, the same alleged discrimination that could be made, under the statute, would actually occur. At common law, a common carrier is only entitled to charge

a reasonable and fair compensation for the services required, and any excess could be recovered by the person employing the service.

Munn v. Illinois, 94 U. S. 113, and cases above cited.

The main object of having a maximum rate established is that, that which the common law leaves indefinite and uncertain, and to the determination of a jury, may be made certain and fixed, and that both the railroad and the public may have a fixed rule for the government of their conduct.

Since the advent of steam railroads, the common-law rule of leaving each individual shipper to adjust his rate with the railroad, according to what is fair and reasonable, has been found to be wholly impracticable, so that it may be said, we think with confidence, that a suit against a common carrier to recover an excess of a charge under the common law has hardly been heard of in the modern growth of railroads.

The Kentucky act does not provide that the rate which the commission is to establish shall be the rate which the railroads charge, as is provided in similar acts of many states. It only attempts to fix a maximum rate, and within the rate thus fixed it leaves the railroads to their own choice and selection.

The rule established by this court in a number of decisions, which will be cited, is that the rate which the railroad charges must be fair to the public as well as to the railroad. A railroad, being a public highway and performing a public service, is amenable to state control in this regard, and its rights and the rights of the public are correlative. A rate which would be unjust to the public, and more than reasonable compensation for the railroad, would be as much an infraction of the rights of the public as a rate which would be unjust to the railroad, and less than reasonable compensation for it would

impair its rights. The elements which control in the reasonableness of the rate fall under the same general rule, but yet vary with each railroad. Without attempting to give all of these elements, but naming only a few for illustration, we may say that the original cost of construction and equipment, considered with the present value of each, the capitalization and bonded indebtedness, considered with reference to the value of the stocks and bonds, and as to whether they have or have not been watered, the cost of maintenance and operation, considered with reference to whether the road is economically or extravagantly managed, form some of the bases from which the return due the road upon its traffic is to be based. The rule for the determination of this resultant fact is uniform and equal, but the fact determined will not be the same, because of the differences in the elements that go to make it up. The result is, that to have a uniform and equal rule, the resultant rate must necessarily be different for different railroads. Thus, a railroad constructed through a mountainous country, at great cost, must necessarily have a rate different from one with little or no fills or cuts, over a level country.

Again, railroads with the same cost of construction and equipment must have different rates, according to the population and character of business in the territory through which they operate.

The criticism, therefore, that different rates may be made by the commission against different railroads, instead of condemning the act, should be its commendation --the rule of the act being merely the rule of the common law, that in each and every case a just and reasonable rate shall be made.

To cite a concrete example, in reference to the Louisville Company: On its Cumberland Valley branch it charges a passenger tariff of four cents per mile. On its main line and branches it charges three cents a mile, and on its Mammoth Cave branch, which is patronized, in

the main, only by excursionists to Mammoth Cave, it charges a rate of ten cents per mile. In fairness to the railroad, it can not be said that the same rate should be charged on its Mammoth Cave branch which is charged on its main line. Upon these propositions, see

Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Gill, 156 U. S. 664.
Railroad v. Minnesota, 134 U. S. 418.
Railroad v. Iowa, 94 U. S. 155.
Peik v. Iowa, 94 U. S. 164.
Stone v. Trust Company, 116 U. S. 307.
Starrs v. Railroad, 11 S. 226.
Ruggles v. Illinois, 108 U. S. 526.
Budd v. New York, 143 N. Y. 517.

The circuit court, in the case at bar, seems to be of the opinion that the same rate must be fixed and applied to all railroads within the state, regardless of their conditions, circumstances, or the territory through which they operate, and for this reason the Act of March 10, 1900, was held to discriminate against the different railroads, and to confer arbitrary power upon the commissioners. It is said in the opinion (we quote from the record of the Louisville Company, R. 23):

> "If one railroad should be convicted by the commission of having been 'guilty of extortion,' and if a lower rate should consequently be fixed by it, such rate is prescribed for the guilty railroad alone, and for none of the others. The effect of the determination that the railroad has been guilty of extortion is individual. This being so, the others are still at liberty to charge, as proper, a rate which, if charged by the one thus convicted, would be deemed extortion, thus not merely inflicting a single penalty for a single offense, but placing the guilty railroad at the disadvantage of having a lower rate than its

> rivals, and depriving it of the equal protection of the laws. It can not be just; it can not be an equality of right or of protection for an act to be unlawful, if done by one railroad in Kentucky, and perfectly lawful if done by another railroad, in the same state."

The theory of the circuit court, we think, is contrary to the moving principle in the fixing of a rate, in all of the cases, which have been before this court, either on appeal or writ of error. The opinion assumes that the commission will fix the rate for one road, and then rest from its labors to enjoy the luxury of seeing that road suffer the penalty of lower rates, while the others revel in extortion. The command is to fix all rates for all roads; and the commission, it must be assumed, will comply with this command as speedily as possible.

In Railroad v. Iowa, 94 U. S. 155, it was held that classifications may be made according to the circumstances of the different railroads. It was there said:

> "It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances."

In Turnpike Company v. Sandford, 164 U. S. 578, brought to this court on writ of error to the Court of Appeals of Kentucky, the very question now discussed was under consideration. It was there contended by the Turnpike Company that the Legislature of Kentucky had fixed for it a rate, but had not fixed a rate for other turnpikes, and that because thereof it was discriminated

against and denied the protection of the Fourteenth Amendment of the Federal Constitution. Mr. Justice Harlan, in delivering the opinion of the court in that case, upon this question, said, on page 598:

> "It is further insisted by the company that the rates prescribed for it by the Act of 1890 are much less than those imposed by the General Statutes of Kentucky upon other turnpike companies of the state; consequently, that that act denies to it the equal protection of the laws. The proposition of the defendant is, that the constitutional provision referred to requires all turnpike companies in the state to be placed by the legislature, when exercising its general power over the subject of rates to be charged upon highways of that character, upon substantially the same footing. Upon this point the Court of Appeals of Kentucky said: 'A turnpike road leading into and connected with a populous city like that of the city of Covington could afford to charge less toll by reason of the immense travel upon it, than turnpikes in thinly settled portions of the county or state, and hence under former Constitutions the legislature has seen proper to regulate the tolls as the turnpike road may happen to be located.' The circumstances of each turnpike company must determine the rates of toll to be properly allowed for its use. Justice to the public and to stockholders may require, in respect of one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road. The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just, both to it and to the public. If the rates prescribed for the defendant in this case were manifestly much lower—taking them as a whole—than the legislature has, by general law, prescribed for other corporations whose circumstances and location are not un-

like those of the defendant, a different question would be presented. At any rate, no case of that kind is properly presented by the pleadings, and there is no ground for holding that the Act of 1890 denies to the defendant the equal protection of the laws."

In that case it was held by the state court, reported in 14 K. L. R., 689; 20 S. W. 1031, that the act did not violate any provision of the state Constitution, and it was held by this court, on writ of error, that the fixing of a rate against that turnpike *alone* did not violate any provision of the Federal Constitution. The state court was reversed, however, because it was held that the reduction of the rate was so great as to deny the turnpike a fair return on its property, and operated to compel the turnpike to do business at a loss.

To the same effect is the case of Commonwealth v. Covington & Cincinnati Bridge Company, 14 K. L. R. 836; 21 S. W. 1042, where the rate complained of specially applied to the Covington bridge. That case, on writ of error, was reversed in 154 U. S. 205, but solely on the ground that as the bridge was a link of communication between the state of Kentucky and the state of Ohio, the statute, in fixing a rate, regulated interstate commerce.

Nor is the Act of March 10, 1900, open to the criticism, in the opinion of the circuit court, that no standard is fixed for the control of the commissioners in fixing the rate, thereby giving them arbitrary power. Were the act silent upon this question, the constitutional limitation, that a reasonable rate was to be fixed, would be read into the act. Such is the ruling in a great number of cases heretofore cited in this brief, and which need not be here repeated.

In the case of Smyth v. Ames, 169 U. S., where the statute, as the act now in question, referred to reasonable maximum rates, this court observed, on page 527:

"Before entering upon its examination, it may be observed that the grant to the legislature, in the

Constitution of Nebraska, of the power to establish maximum rates for the transportation of passengers and freight on railroads in the state, has reference to reasonable maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness."

For the act in question to have laid down any other rule, it would necessarily have been compelled itself to name the rate, and, therefore, the duties of the commission, in that regard, would not have been needed.

Again, in the case of Smyth v. Ames, in speaking of the particular facts of each railroad with reference to which the rate must be fixed to be reasonable, whether applying to interstate or state commerce, the opinion (on page 540) says, quoting from the opinion of Mr. Justice Brewer, in 64 Fed.:

"(But they are not necessarily bound to give absolutely the same rates to the people of all the states), for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both states might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states, are of little value, unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two states is

of comparatively little significance." 64 Fed. Rep. 165. "In these views we concur, and it is unnecessary to add anything to what was said by the circuit court on this point."

And again, on page 547:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. . . . On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the Act of 1893, an actual loss in each of the years ending June 30, 1891, 1892 and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution."

We think it is apparent from this decision that the condition of each road forms a separate and distinct basis with reference to the reasonableness of the rate to be fixed and that a rate can not be reasonable and fair, to both the railroad and the public, which applies to all railroads, regardless of their different conditions. In the case cited, the reasonableness of the rate was considered with reference to each road separately, and we believe the inference is justified that if the court had found the schedule of rates reasonable, with reference to any particular road, the injunction would have been denied to it, although granted to the others.

To the same effect is the case of Reagan v. Trust Company, 154 U. S., where the statute expressly required the

rate to be fixed with reference to railroads separately. (See Section 3, in the statement of the case, pages 362-3.)

In the acts in both of the cases cited, and also in the Minnesota act, in the Minnesota case, 134 U. S., the railroad commission was given the power to change and alter the rates, from time to time, a feature of the Kentucky Act of March 10, 1900, referred to in the opinion of the circuit court, as conferring arbitrary power, upon the commission. This same feature appears in the Act of Congress creating the Interstate Commerce Commission, but this court has never, so far as we are informed, found that such a provision, either in the Federal law, or in any state law, is open to objection. On the contrary, from the reasoning of the cases, it appears that some such elasticity, in the regulation of rates, is necessary to keep them, at all times, fair and reasonable. If the rate be fixed by the legislature, it must stand, if at all, until the next session of that body. What is reasonable and fair one year may not be such the following year. That the act may permit unjust discriminations under the powers conferred on the commission is no objection to the validity of the act, so long as it does not demand or authorize such discrimination. The possibility of such discrimination should have no more weight against the validity of this act than the possibility of an unjust enforcement, which pertains to every law. The law itself provides an equal and uniform rule for the making of a rate. It must be reasonable. The power conferred to alter or change the rate is only a provision to insure the establishment and maintenance of a reasonable rate at all times and under all circumstances for each road.

In Railroad v. Matthews, 174 U. S. 96, on writ of error to the Supreme Court of Kansas, the validity of an act of the legislature relating to liability of railroads for damage by fire was before this court. Mr. Justice Brewer, in delivering the opinion of the majority, said (page 104), after quoting from the case of Barbier v. Connolly, 113 U. S. 27:

"This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished."

And again, on page 106:

"Indeed, the very idea of classification is that of inequality, so that is goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In Williams v. Mississippi, 170 U. S. 214, this court, speaking through Mr. Justice McKenna, in regard to a claim that the law of Mississippi discriminated against the negro race, distinguishing the case then before the court from the case of Yick Wo v. Hopkins, 118 U. S. 356 (which, most likely, will be relied upon by complainants in the case at bar), said (page 223):

"There is no charge against the officers to whom is submitted the selection of grand or petit jurors, or those who procure the lists of the jurors. There is an allegation of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the Constitution or laws, or by those who administer them. If it is done in the latter way, how or by what means should be shown."

The court then ruled that the equal protection of the laws is not denied on the ground of unjust discrimination, simply because it grants a discretion to certain officers, which can be used to the abridgment of the right of an individual, unless it be shown that the actual administration of the law is to this effect, and is evil; but the possibility of an evil administration is no concern of the court.

In the Chinese Laundry case, 118 U. S., there was an actual purpose in the law to discriminate, and an actual

discriminating administration of that law. It conferred naked arbitrary power on a board of supervisors to say who should conduct business, without prescribing any qualifications whatsoever. The board might arbitrarily withhold its consent from one person and grant it to another under like circumstances. The law in question here, however, applies equally to all railroad corporations in the Commonwealth alike.

Sustaining the same principle, is the case of Grundling v. Chicago, by Mr. Justice Peckham, 177 U. S. 183, involving the Chicago cigarette license ordinance.

In Budd v. New York, 143 U. S. 517, the law of the state of New York, regulating the fees and charges of elevators and warehouses, applied only to those located in places which had a population of 130,000 or more, but it was held by this court that such a limited application did not amount to a discrimination which deprived the warehouses and elevators in such places of the equal protection of the laws.

In Dow v. Beidelman, 125 U. S. 680, this court, in an opinion delivered by Mr. Justice Gray, in treating of the contention that the rate law of Arkansas violated constitutional limitations in making an unjust discrimination, said:

> "The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provisions securing to all the equal protection of the laws."

Laws levying a tax on inheritances, graduated according to the value of the estate, and on lineal and collateral relationship to the testator or intestate, are held to be valid.

Magoun v. Trust Company, 170 U. S. 282.

Another contention of the bills of complaint is that the Act of March 10, 1900, is invalid because it does not apply to all common carriers, but applies only to railroads.

We do not think that this contention is forceful, in view of the many decisions of this court.

In Orient Insurance Company v. Daggs, 172 U. S. 560, it was held that a fire insurance company, under the law of the state of Missouri, was not denied the equal protection of the laws by a statute which was applicable only to fire insurance. In that case, in an opinion delivered by Mr. Justice McKenna, it is said on page 562:

> "It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283 (42: 1037). We said in that case that 'the state may distinguish, select and classify objects of legislation, and, necessarily, the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid, because not depending on scientific or marked differences, in things or persons, or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary."

In Railroad v. McKey, 127 U. S. 205, a law of Kansas abrogating as to railroads the rule of the common law exempting masters from liability to one servant for the

negligence of another, was sustained as a valid classification, notwithstanding that it was not applied to other carriers. In that case this court held that the law was not violative of the equality clause of the Fourteenth Amendment, "if all persons subject to it are treated alike under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed."

In Railroad v. Beckwith, 129 U. S. 26, a law of Iowa, making a class of railroad corporations for special legislation, was sustained.

In the case of Railroad v. Bristol, 151 U. S. 555, it was held that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike.

Of like nature is the case of Railroad v. Humes, 115 U. S. 512, regarding the railroad fence laws of the state of Missouri.

In Cutting v. Stock Yards, 79 Fed. 679, a Kansas statute regulating stock yards was held not objectionable as class legislation because it applied only to stock yards doing a certain volume of business, as the law was uniform in its operation on all yards coming within the designated class.

In Bowman v. Lewis, 101 U. S. 22, a statute of Missouri was drawn in question. In four counties of the state appeals from the judgments of the circuit courts were allowed to the Court of Appeals. In all other counties appeals were allowed to the Supreme Court, which was also given appellate jurisdiction over certain judgments of the Court of Appeals. This court upheld the statute, and in the opinion said:

> "If diversity of laws and judicial proceedings may exist, in the several states, without violating the equality clause of the Fourteenth Amendment, there is no valid reason why there may not be such diversity in different parts of the same state. When part of a

> state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions. It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies."

Where the diversity pointed out by the court exists, as, for example, in a great state like Texas, is it not as needful for the state to possess the power to adjust the rates for different roads, existing and operating under diverse conditions, as it is to provide laws and judicial procedure for each locality? The power, in the opinion of this court, was left in the states to meet such exigencies.

Again, in Hayes v. Missouri, 120 U. S. 68, another statute of Missouri was considered and upheld by this court. The statute in question, in certain counties, allowed the state a certain number of peremptory challenges in criminal cases. In the other counties the state was allowed fewer challenges. A person tried and convicted in a county where the state was allowed the greatest number of challenges, complained that he was denied the equal protection of the law. Concerning this contention this court said:

> "The Fourteenth Amendment . . . does not prohibit legislation, which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

The railroad companies are only entitled to the equal protection of the law, in reasonable rates. They have no right to be protected in unreasonable rates. Neither

have they the right to have another company or companies protected in such unreasonable rates, in order that they may thereby maintain unreasonable rates for themselves. Consequently, the law which empowers the commission to investigate the rates and make them conform to the standard prescribed, operates on all alike who may be charging unreasonable rates.

In Missouri Pac. Railway v. Mackey, 127 U. S. 205, in reply to the contention that the law complained of only applied to railroads, the court said:

> "It is simply a question of legislative discretion, whether the same liabilities shall be applied to carriers by canal and stage coaches as to persons and corporations using steam."

To the same effect is Soon Hing v. Crowley, 113 U. S. 703. The contention in the bill (paragraph 6, page 8, R. Louisville case), that the appellees are denied the equal protection of the law, because the Act of March 10, 1900, only applies to "railroad companies or corporations," is untenable, because, under the law of Kentucky, a railroad can not be operated by a private person. Under Section 562, Kentucky Statutes, if a person should become the owner, at private sale or under judgment of a court, of the franchise and property of a railroad corporation, he is required to organize a corporation for the operation and management of such railroad. The organization of such corporation is provided for by Sections 538, 539, and 763, Kentucky Statutes.

It therefore follows that inasmuch as a railroad can only be operated, in Kentucy, by a company or corporation, there can be no discrimination under the statute against such companies or corporations.

The statutes of Kentucky requiring that railroads can only be operated by corporations, is declaratory of the law as announced in State v. Boston Railroad Co., 25 Vt. 433, where it was said that the "right to build and run a

railroad, and to take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature."

The sections of the Kentucky Statutes referred to will be found in the appendix.

Upon the propositions here discussed, we, therefore, contend:

1. That the Act of March 10, 1900, does not confer arbitrary power upon the railroad commission, and does not provide for any arbitrary or unjust classification or discrimination in the making of rates.

2. If there be a possibility of an evil administration of this law, it is no more than can be said of any existing law; but the court will not, in advance of an administration of a law, assume a violation of public duty by public officers.

3. The rule of the act is to fix a reasonable rate which involves the correlative rights of the railroads and the public. That different rates may be made for different railroads under different circumstances is a result of the necessity of an equal and uniform law. The same rate for all railroads, regardless of circumstances, would, in many instances, be arbitrary and unjust, either to the railroad or the public.

4. Classification is not a denial of the equal protection of the laws, but is demanded in many instances by proper legislation, and railroads have always been held to constitute a separate and distinct class from other corporations.

Contract.

The questions heretofore discussed are common to all of the cases, but the questions under this heading of "Contract" apply only to the Louisville Company and the Cincinnati Company. With reference to each the question is different. The contract claimed

by the Louisville Company is prior to a general law of the state of Kentucky providing that all charters should be subject to alteration, amendment and repeal; and its charter makes no such provision. The charter of the Cincinnati Company contains a provision subjecting it to alteration, amendment and repeal, and was granted long after the existence of a general law upon that subject. We shall, therefore, consider the alleged contract of these two companies separately, first considering that of the Louisville Company, which presents the greater difficulty.

The contract of the Louisville Company is claimed under Section 18 of the Act of the State of Kentucky, approved March 5, 1850, entitled, "An act to charter the Louisville & Nashville Railroad Company." Said section reads as follows:

> "Section 18. That the president and directors shall have power to purchase, with the funds of said company, and place on any railroads constructed by them, under this act, all machines, wagons, vehicles or carriages of any kind, which they may deem proper, for the purposes of transportation on said road; and that they shall have power to charge for tolls, and the transportation of persons, merchandise, and property of any kind whatever, transported along said railway, any sum not exceeding the following rates, to wit, on all goods, merchandise or property, for every one hundred pounds transported over twenty miles and under fifty miles, three and a half mills for each mile; and for persons, and every species of live stock, and every other description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort; that it shall not be lawful for any other company, or any other person or persons, to travel upon or use any of the roads of said company, or to transport persons or property thereon, without the license and permission of the president and directors thereof; and that the said road or roads, with all their works, improvements or

profits, and all the carriages, vehicles and machinery for transportation used therein, and all other species of property thereunto belonging, are hereby vested in said company incorporated by this act, and their successors, forever; and shall never be taxed beyond the rate of tax imposed upon real estate, estimated upon the prime cost of the proposed works; nor will the legislature of this Commonwealth, for the space of thirty years, authorize any other railroad to be laid down on a parallel line with the one located by this company, extending from Louisville to the Tennessee line, approaching nearer than ten miles: Provided, full power is hereby reserved to this state to incorporate, hereafter, a company or companies to build a railroad or railroads, and that any and all such railroad or railroads, hereafter constructed, may connect and join with the road hereby contemplated; and full right and privilege is hereby reserved to the state, or individuals, or any company heretofore or hereafter incorporated by law of this state, to cross this road, provided any other railroad connecting with the road hereby provided for shall lead from the main route and diverge therefrom at an angle of twenty degrees or more: Provided, that in forming such connection, or in crossing said road, no injury be done to the works of the company hereby incorporated; and that nothing in this act shall be so construed as to deprive any subsequent legislature of the power to authorize the 'Kentucky and Mississippi Railroad Company' to extend their said road from Hopkinsville to Louisville, or of the power at any time hereafter of incorporating a company to construct a railroad from Louisville to some point upon the Mississippi river, in this state."

And Section 20 of an act approved February 28, 1848, incorporating the Lexington & Frankfort Railroad Company, referred to in the aforeaid section of the charter of the Louisville Company, reads as follows:

"Section 20. Be it further enacted, that the said board of directors shall have power to purchase, with the funds of said company, and place on any

railroad constructed by them, under this act, all machines, wagons, vehicles or carriages, of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and that they shall have power to charge for tolls, and the transportation of persons, goods, produce, merchandise, and property of any kind whatsoever, transported by them along said railway between Lexington and the Kentucky river, any sum not exceeding the following rates, to wit, for transporting, any distance, single packages, weighing less than one hundred pounds, twenty-five cents; and at that rate, if such packages weigh more than one hundred pounds; for transporting goods, produce, merchandise, or property of any kind, not less than three and a half mills, nor more than four mills, per hundred pounds' weight, per mile; for transporting passengers, not less than three and a half cents per mile, nor more than four cents per mile for each passenger, with his baggage, not weighing more than forty pounds; except upon the article of coal, upon which there shall be charged not less than three cents on the bushel; but the charge on coal shall at no time be fixed at a rate which will not yield a profit on its transportation. Live stock, poultry and furniture; also feathers, wool, rags and other light, bulky articles, weighing not more than sixty-five pounds to the cubic foot; also silver and gold, bullion, money of all descriptions, and mails, are excepted from the rates herein established; and the board of directors, or their agents, shall be, and they are hereby, authorized to contract specially for their transportation, upon such terms as the parties interested may agree upon: Provided, such rates shall in no case exceed 15 per cent over the rates allowed to be charged for heavy merchandise or produce, except for gold, silver, bullion, money of all kinds, and nails. The said board of directors, and their agents, may charge for receiving, forwarding and storing such articles and packages as may be consigned to them, or deposited in their warehouses, or with their agents, for safekeeping, or to be forwarded; and they may establish, by their by-laws, rates of stor-

age, and other fees, for such services. But they shall make no rule or regulation, giving any preference in transportation of goods or other articles sent from other houses, stores or places; nor shall they make any difference in the rates of charges on goods, or other property, consigned to other persons for transportation on said road; but shall, in all things, receive and receipt for goods and property of every kind consigned to other persons, on the same terms as if consigned to themselves. It shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons, or merchandise, or property of any description whatsoever, along said roads, or any of them, without the license or permission of the board of directors of said company, and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said roads, are hereby vested in said company incorporated by this act, and their successors, forever. They may commence the business of transportation on their railroad when any part thereof is completed."

By Section 2 of the Act of March 5, 1850, incorporating the Louisville Company, it is created a corporation with perpetual succession. That section reads as follows:

"Section 2. That the capital stock of said Louisville & Nashville Railroad Company shall be three millions of dollars, in shares of one hundred dollars each, which may be subscribed for by any individual or corporation; and as soon as three thousand shares of said capital stock shall be subscribed, the subscribers of said stock, their successors and assigns, shall be, and they are hereby, declared to be incorporated into a company, by the name of the Louisville & Nashville Railroad Company, and by that name shall be capable of purchasing, holding, selling, leasing and conveying real estate not exceeding ten thousand acres, and personal and mixed estate, so

far as the same shall be necessary for the purposes of their incorporation, and no further; and shall have perpetual succession, and by said corporate name shall sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at pleasure; and shall have, enjoy and exercise all the powers, rights and privileges which other corporate bodies may lawfully do."

By Section 14 of that act, it is only incorporated to construct a railroad from the city of Louisville to the Tennessee line, in the direction of Nashville. That section reads as follows:

"Section 14. That the president and directors of said company are hereby vested with all powers and rights necessary to the construction of a railroad from the city of Louisville to the Tennessee line, in the direction of Nashville; the route to be by them selected and determined, not exceeding sixty-six feet wide, with as many sets of tracks as they may deem necessary; and that they may cause to be made contracts with others for making said railroad, or any parts of it; and that they, their agents, engineers, etc., or those with whom they may contract for surveying or making the same, or any part thereof, may enter upon, use and excavate any land which may be wanted for the site of said road, or the erection of warehouses or other structures or works necessary to said road and its use, or for any other purpose necessary or useful in the construction or repair of said road, or its works and appurtenances; and they may build bridges and construct tunnels: Provided, the same do not obstruct the navigation on navigable streams; may fix scales and weights, lay rails, take and use any earth, timber, gravel, stone, or other material, which may be useful or necessary for the proper construction, completion or repair of said road."

It is our contention:

1. That the matter of regulating rates of a railroad

pertains to that branch of the police power which is not the subject matter of an irrevocable contract.

2. If it be pertinent for a state to preclude itself from the exercise of this power by an irrevocable contract, the charter of the Louisville Company does not come to an irrevocable contract on the subject of rates.

3. If the charter provisions relied upon do create an irrevocable contract, they do so only with reference to the main line of the Louisville system between Louisville and the Tennessee line, in the direction of Nashville, which, according to the allegations of the bill (R. 2), is 139.88 miles.

We think it will lend clearness to discuss these propositions in the order named.

In view of the many expressions contained in the judicial announcements of this court, to the effect that the rates of public carriers are always subject to the regulation of the police power of a state, except where an irrevocable contract has been made fixing a rate, it is with considerable hesitation that we make the contention announced in the first proposition. We are, however, encouraged in so doing by the fact that, as far as we are informed, this court has not, to this time, held the charter of any railroad or quasi-public corporation, with reference to rates, to constitute an irrevocable contract, relieving such railroad or corporation from the regulating power of the state creating it. In fact, wherever the question has been pressed upon the court, it has refused to give a final adjudication upon it, and in several cases serious doubts as to the existence of such a power in one legislature, by an irrevocable contract, to tie up succeeding legislatures, have been expressed.

In several decisions in the state courts the existence of such power has been denied, but in several decisions of the circuit Federal courts such contracts have been sustained.

If the court should conclude that the charter of the

Louisville Company comes to a contract with the state touching its rates, if the state has power to make such a contract, it may be that in this case the court will feel itself obligated to give a final decision upon this important question.

In the case of the Louisville Company it is contended and admitted by the demurrer, and is a fact which can not be denied, that that company is now charging rates very much below the maximum rates named in its charter. In fact, if it should charge up to the maximum there permitted, the rates would be almost confiscatory as to freight passing over its lines. Its contention, however, is that it has an irrevocable contract to charge the maximum there named, and, therefore, any attempt to reduce its rates would be a violation of its contract with the state. Its contention, therefore, is that the railroad commission has no right even to investigate its rates, or to take any step under the Act of March 10, 1900, regarding it, because to do so could only result in a futile act and idle ceremony, or in the doing of an illegal act, to wit, violating its contract in the reduction of its rates.

What we have heretofore said on the subject of jurisdiction applies, we think, to this claim of the Louisville Company, and that even if the contract were irrevocable, no jurisdiction would exist, in the court, to stay the hand of the commission until it had fixed a rate in violation of the contract. If it be true, as alleged in its bill, that its rates are reasonable, it must be assumed by the court that the commission will not interfere with these rates. We shall leave this phase of the case, however, with the argument heretofore made.

The circuit court in its opinion in the case at bar (R. 25), practically held that the Louisville Company had an irrevocable contract with the state, but, if not, the Act of March 10, 1900, can not be construed as intending to apply to the Louisville company.

The main reliance of the complainant for holding the

charter provision a contract, is this expression of Mr. Justice Brewer, in delivering the opinion in Reagan v. Trust Company, 154 U. S. 393:

> "If the charter had, in terms, granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the state, which it could not repudiate."

It must be observed, however, that in this enunciation the court was not there adjudging the matter. As we understand that case, the question of a charter contract to charge certain specified rates was not involved. The question of contract seems to have been raised and was treated by the court wholly with reference to its bearing upon the jurisdiction of the circuit court. It was there contended that by virtue of the act incorporating one of the railroads, a contract was created with the state, obligating the corporation to construct and operate a railroad between the termini named, and on the part of the state that it would not prevent the company from so constructing and operating the road, and therefrom it was contended that an attempt, on the part of the state, to so reduce the rates as to compel the corporation to operate the railroad at a loss was a violation of this contract. In making the above statement, relied upon, at bar, by the Louisville Company, the court was answering this contention. Therefore, it is that we say that this court did not intend, by that expression, to decide that it is within the power of a state to make an irrevocable contract probibiting it forever from exercising this important function of its police power.

It must also be borne in mind that until the case of Smyth v. Ames, 169 U. S., the decisions of the court left the matter in doubt as to the exact limitations upon the staet in reference to the extent of its power in regulating

rates. It had been held that they could not be confiscatory, and that they must be reasonable, and that the court would judge of the reasonableness of the rate when fixed, but the elements entering into the determination of the reasonableness of the rate had not been outlined, and there was some doubt as to whther the power of the state was limited at compelling the roads to do business at a loss, or whether the reasonableness of a rate included a profit on it business and dividends on its stock, and, if so, to what extent.

The Reagan case, as we understand it, bore only upon this feature. At all events, we do not think it can be said that the Reagan case is a direct authority upon the question now considered.

We are not unmindful of the fact that the right of taxation, than which there is possibly nothing more essential to the sovereignty of a state, may be bartered away. By repeated decisions the court is committed to this doctrine, but not without stubborn opposition. It must also be borne in mind that the decided tendency is against any further extension of the doctrine of the Dartmouth College Case. On the contrary, the tendency seems to be to confine the doctrine of that case, except in so far as the court has heretofore been committed, to strictly private corporations. At all events, the court has refused to extend or apply the doctrine to numerous exemplifications of the police power not more important than the one now under consideration.

Well established is the doctrine, that, that which pertains to the health, morality, welfare and good order of a state can not be bartered away by contract:

Stone v. Mississippi, 101 U. S. 814.
Douglas v. Commonwealth, 168 U. S. 488.
Fertilizing Company v. Hyde Park, 97 U. S. 659.
Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677.

Boston Beer Company v. Massachusetts, 97 U. S. 25.
New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650.
Mugler v. Kansas, 123 U. S. 623.
Slaughter House Cases, 111 U. S. 746.

In Ruggles v. Illinois, 108 U. S. 536, where a contract excluding the state from the exercise of its power to regulate rates was very much pressed upon the court, Mr. Chief Justice Waite used this language:

> "In the view we have taken of this case, the only question that need be considered is, whether the charter of the Central Military Tract Railroad Company, one of the Illinois corporations which, through agreements of consolidation are now represented by the Chicago, Burlington & Quincy Railroad Company, purports, on its face, to grant to the company the right to fix the rates of fare and freight to be charged for the conveyance of persons and property on its railroad, free of all control by the state. *If, on examination, we find that no such grant was intended, it will be unnecessary to decide whether one legislature has the power to bind succeeding legislatures by a contract to that effect.*" (The italics are ours.)

In New Jersey v. Yard, 95 U. S. 104, Mr. Justice Miller, in delivering the opinion of the court, used this language:

> "The writer of this opinion has always believed, and believes now, that one legislature of a state has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

In Stone v. Trust Company, 116 U. S. 307, Mr. Chief Justice Waite, delivering the opinion of the court, said, in speaking of the power of a state to contract away its right to regulate railroad rates:

> "This power of regulation is a power of government continuing in its nature, and *if it can be bargained away at all* it can only be by words of positive grant or something which is, in law, equivalent." (The italics are ours.)

Although in that case both Mr. Justice Harlan and Mr. Justice Field dissented, on the ground that the rates of the road were protected by a contract, the dissent was not upon the theory that the state had a right to preclude itself by contract from making reasonable rates, but the theory of both the dissenting opinions seems to be that at that time it was conceived, that, under the regulating power of the state, the road would be bound by whatever rate the state might fix. In that case the extent of the right of the state to contract regarding the regulation of rates is, as we understand the dissenting opinions, to prevent from making unreasonable rates and enforcing them against the roads. Mr. Justice Harlan, in his opinion, said:

> "My only purpose is to express the conviction that each of these companies has a contract with the state, whereby it is exempted from absolute legislative control as to rates, and under which it may, through its directors, from time to time, within the limit of reasonableness, establish such rates of toll for the transportation of persons and property as they deem proper; *such rates to be respected by the courts and by the public, unless they are shown affirmatively to be unreasonable.*" (The italics are ours.)

Mr. Justice Field, in his opinion, said:

> "Certainly no one will deny that the right to adopt a rate of charges, *subject, as such rate always is, to*

> *the condition that they shall be reasonable, was of vital importance to the company.* Without that concession, no one acquainted with the difficulties, expenses and hazards of the projected enterprise can believe that it would have been undertaken. It was certainly the expectation of the constructors of the road that they should be allowed to receive compensation having some relation to its cost. But the Act of Mississippi allows only such compensation as parties appointed by the legislature, not interested in the property nor required to possess any knowledge of the intricacies and difficulties of the business, shall determine to be a fair return on the *value* of the road and its appurtenances, though that may be much less than the original cost." (The italics are ours.)

We do not think that either of these dissenting opinions tends to sustain the doctrine that the state, by contract, can preclude itself from regulating the railroads so as to require them to put in force a schedule of rates reasonably fair, both to itself and the public. Without the protection of a contract, by virtue of the Fourteenth Amendment as now established, it can not force upon the railroads the adoption of a reasonable rate.

In the case at bar, the Louisville Company, is seeking to have the court adjudge that it, by contract with the state, can charge a rate unreasonable and unfair to the public and amounting almost to the confiscation of the property of the shipper.

In the more recent rate cases, where a contract regarding rates has been claimed, the court has either avoided the question, or has answered it by finding that in the particular case there was not a contract.

In Railroad v. Illinois, 146 U. S. 387, touching the Lake Front in Chicago, claimed by the railroad under a contract and grant from the state, Mr. Justice Field, in delivering the opinion of the court, said:

> "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a

public trust under which he was bound to hold and manage it."

In Railroad v. Nebraska, 170 U. S. 57, on writ of error to the Supreme Court of Nebraska, it was contended on behalf of a railroad that the viaduct which the state was seeking to compel it to maintain and repair had been constructed by it under a contract with the state, which relieved it from this obligation. Mr. Justice Shiras, in delivering the opinion of the court in that case, speaking on the contention of the contract, said (page 72):

"No doubt, the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation? Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature, when exercised to protect the public safety, health, and morals, and that clause of the Federal Constitution which protects contracts from legislative action can not, in every case, be successfully invoked. The presumption is

that, when such contracts are entered into, it is with the knowledge that parties can not, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

To the same effect, see:

Railroad v. Bristol, 151 U. S. 556.
Railroad v. Defiance, 167 U. S. 88.

In Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677, on writ of error to the Court of Appeals of the State of Kentucky, regarding the right of the Louisville & Nashville Railroad to purchase a parallel railroad, notwithstanding a provision of the State Constitution of 1891, prohibiting such purchase or consolidation, it was contended, on behalf of the road, that, under its charter, granted in 1856, it had an irrepealable contract with the state, conferring upon it this power. In speaking upon that subject, Mr. Justice Brown, in delivering the opinion of the court, said (page 695):

"While there is no general reservation clause in the charter of the L. & N. Co., we think, for the reasons stated in the Pearsall case, that under its police power the people, in their sovereign capacity, or the legislature as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health, and safety of its passengers, or the public, or for the security of property, or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety, or morals, we have frequently held

that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests."

In the case of Pearsall v. Railroad, 161 U. S. 648, this court, speaking through Mr. Justice Brown, in a case involving the right of a state to prohibit the consolidation of two railroads, notwithstanding permission so to do was granted in its charter, said (page 667):

> "The contract protected by this clause must also be founded upon a good consideration. If it be a mere nude pact and bare promise to allow a certain thing to be done, it will be construed as a revocable license," (citing a great number of cases).

And again (page 675):

> "We think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we can not recognize a vested right to do a a manifest wrong."

It would seem that the regulation of railroads, to prevent the imposition upon the public of extortionate rates, is as important to the welfare of the people, as the prevention of monopolies by the consolidation of public agencies. In fact, the object of preventing consolidation is to prevent extortion. If the one is not the subject matter of an irrevocable contract, neither should the other.

In the case of Railroad v. Transportation Company, 25 W. Va. 324, it was urged upon the court that a contract had been made with the state, fixing the rates to be charged, and that this could not subsequently be changed by the state. For the contention, reliance was placed upon that expression of Mr. Chief Justice Waite, in the Granger cases, to the following effect:

"It was within the power of the company to call upon the legislature to fix permanently the limit and make it a part of the charter. If that had been done, the charter might have presented a contract against future legislative interference."

In rejecting the argument there made, in a well-considered opinion reviewing many authorities, the Supreme Court of West Virginia (on page 363) said:

"If the price was fixed in the charter for such use, it could be afterward changed by the legislature at its pleasure, just as the legislature, though no price was fixed in the charter, and the company by it was entirely unrestricted as to the price it might charge for the use of its property, could, as decided by these Granger cases, subsequently fix the price to be charged, and change it from time to time, as might seem by it to be required by the public good. This necessarily results, because it is always agreed, tacitly, by every common carrier, whether a private person or a railroad company, when he engages in that business, that the legislature may, from time to time, as it pleases, fix the charges for the transportation of passengers or freight. If a price, which may be charged for such service, is named in the charter, it is but a legislative fixing of the charge for the time being, and it may be changed from time to time; and even if there was inserted in the charter a provision that the price fixed in the charter should never be altered by the legislature, that would not alter the case, for by the decisions of the court in the Granger cases the common carrier, as soon as he engages in this business, whether he be a private person or a railroad company, agrees that his charges for the use of his property may be controlled by the public, through the legislature, at its pleasure; and this agreement or understanding must necessarily make any stipulation in the charter, that the charges of the company shall never be changed, a mere nullity."

We are aware that several state court decisions and several decisions of the Federal Circuit Court have recognized the right of one legislature to contract with reference to tolls to be charged by a railroad, so as to render an attempt by a succeeding legislature to fix the tolls an impairment of a contract within the Federal Constitution. See

Pingree v. Railroad, 76 N. W. 635.
Stone v. Railroad, 62 Miss. 607.

A similar ruling was made by the Federal Circuit Court in the case of Central Trust Company v. Citizens' Str. R. Company, 80 Fed. 218; 82 Fed. 1; 83 Fed. 529; 27 C. C. A. 580; but a contrary ruling was made by the Supreme Court of the state touching the same charter rights.

Nevin v. Indianapolis, 151 Ind. 139; 47 N. E. 525; 51 N. E. 80.

If an irrevocable contract can be made touching the rates of a common carrier, the question still remains as to whether the particular provision relied upon comes to a contract on the subject within the protection of the Federal Constitution.

To do this, it is our contention that the language of the charter provision, referring to rates, must do more than merely fix a maximum, and that it must show clearly that the state intended to exclude itself, in the future, from exercising any power to change or alter the rates fixed. The charter must not only fix the rates for the time being, but must also, by clear language or necessary implication, exempt the corporation from all future and further regulation on the subject. If the charter merely fixes a maximum of rates, then it is competent, at any time, for the state further to regulate the rates within the maximum thus made. Such action would be no violation of the contract, even if the charter provision were construed as a contract fixing the maximum. The fixing of such a maximum precludes the corporation from charging beyond it,

but leaves the corporation the power to fix any rate within the maximum when circumstances alter. Added to this is the common law and common understanding that the rate fixed within the maximum shall be reasonable. It is the duty of the corporation to fix a rate reasonable to the public? The state, unless it has by words of exemption precluded itself is, at all times, at liberty to compel the corporation to do that which is its duty to do. A charter incorporating a railroad and fixing a maximum of rates is not, in legal effect, different from the granting of a charter, under a general law, existing at the time fixing such a maximum.

It will hardly be contended that a railroad, simply because it was chartered while a general law existed fixing certain rates, thereby had a contract with the state that those maxima should exist for all time to come. By either a general law or a specific provision in a charter fixing a schedule of maximum rates, the legislature undertakes only to say that such a schedule, at that time, is reasonable, still reserving, however, the power to change the rate as circumstances change.

It is not to be forgotten that under the second section of the charter of the Louisville Company, quoted supra, it is made a perpetual corporation. Therefore, if the provisions relied upon constitute a contract, the Legislature of Kentucky, in 1850, has undertaken the foolish task of providing a maximum schedule of rates to govern to the end of time, regardless of the fact, necessarily contemplated, that in the course of events, such rates must become extortionate.

Mr. Tiedeman, in his work on State and Federal Control of Persons and Property, page 952, Section 209, in speaking of the rule for the interpretation of such provisions in charters, says:

> "Apart from the question whether the state can barter away its police power, the intention of a legislature to place a private corporation beyond the

reach of the police power of the state—to grant to a corporation the right to do what it pleases in the exercise of its corporate powers, it matters not how much injury is inflicted upon the public, and yet be subject to no control or restraint, which is not provided by the laws in force when the charter was granted—is so manifestly unreasonable that we can not suppose that the legislature so intended, unless this extraordinary privilege is expressly granted."

And again, on page 955:

"Unless there is an express reservation of a freedom from the restraint of police regulations, it would be an exceedingly liberal, and, hence, wrongful, construction of the constitutional protection, against the impairment of the obligation of contracts, to place corporations above and beyond the ordinary police power of the state. As a general proposition, the principle here advocated has been recognized and adopted by the courts generally. It is only in the application of the principle to a particular case that any doubt as to its correctness is felt or expressed."

Mr. Russell, in his work on Police Powers of the State (pages 127, 128), lays down the rule thus:

"The decision in the Charles River Bridge case is the existing law as appears in the recent opinion of Mr. Justice Gray. He said that every public grant, if ambiguous, is to be construed against the grantee, because an intention to grant away rights in which the whole public is interested can not be presumed unless unequivocally expressed, or necessarily to be implied; and, also, because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him, and the words used are to be treated as the words of the grantee. 'This rule of construction,' he said, 'is a safeguard of the interest of the public against any attempt of the grantee to take by the insertion of ambiguous language what could not be obtained by clear and express terms,' citing the Charles River Bridge case and others," citing:

Central Transp. Co. v. Pullman Co., 139 U. S. 49, and other cases.

In Fertilizing Company v. Hyde Park, 97 U. S. 659, this court said:

> "The rule of construction in this class of cases is that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded, but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

In Minott v. Railroad, 18 Wall. 204, known as the Delaware Railroad Tax Cases, it was held that a provision in the charter that the railroad company should pay annually into the treasury of the state a tax of one-quarter of one per cent on its capital stock of $400,000.00, without any words indicating the intent of the legislature that no further or different tax should be subsequently levied, was not sufficient to show a contract prohibiting the state from making a different tax levy, the court there remarking

> "The surrender, when claimed, must be shown by clear and unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power."

To the same effect is Bailey v. Maguire, 22 Wall. 215.

In Stone v. Wisconsin, 94 U. S. 181, it was held that a charter provision making it lawful for the company to demand and receive such sum or sums of money for passage and freight of persons and property as they shall, from time to time, think reasonable, did not amount to a contract, delegating to the railroad the right to fix its own rates.

In Ruggles v. Illinois, 108 U. S. 536, it was held that a provision of a railroad charter conferring power upon the

directors of the road, in the language following, did not amount to a contract:

> "The directors of such company shall have power to make by-laws for the management and disposition of stock, property and business affairs of such company, not inconsistent with the laws of this state. . . .
>
> "To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage, shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided. . . .
>
> "Section 32. The legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freight or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent per annum on the capital actually paid in; nor, unless on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income divided by the company from all sources for the year then last past shall have exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in."

Mr. Chief Justice Waite, in holding that, notwithstanding this charter, the state could regulate the matter of rates, said:

> "Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction, as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court, in Charles River Bridge v. Warren Bridge, 11 Pet. 547: 'It can never be assumed that the government intended to diminish its power of ac-

complishing the end for which is was created.' This is an elementary principle."

To the same effect are

Railroad v. Illinois, 108 U. S. 541.
Ruggles v. Illinois, 91 Ill. 262.

In Stone v. Trust Company, 116 U. S. 307, it was contended on behalf of the railroad that the following provision of the charter exempted it from further regulation of its rates by the state:

"That it shall be lawful for the company hereby incorporated, from time to time, to fix, regulate and receive the toll and charges by them to be received for the transportation of persons or property on their railroad or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof."

In holding such provision not to amount to a contract, this court said:

"This power of regulation is a power of government, continuing in its nature; and if it can be bargained away at all it can only be by words of positive grant or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in Providence Bank v. Billings, 4 Pet. 560 (29 U. S. bk. 7, L. ed. 955), 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' . . . The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention."

In Stone v. Railroad, 116 U. S. 347, it was held that the grant of power to the president and directors of a railroad to adopt and establish such rates for transportation as they may deem proper, and to alter and change the same at pleasure, does not amount to a contract, but leaves the state free, within the limits of general authority, to act as to the reasonableness of such rates. In this case (on page 352) it was held that the provision in a charter, that in fixing rates there shall be no discrimination in favor of any other road, does not bring into that charter the rate clause in charters subsequently granted fixing maximum rates so as to exempt such railroad from the operation of the railroad supervision act of Mississippi.

In Banking Company v. Smith, 128 U. S. 174, the following provisions in the charter were relied upon as constituting a contract:

> "The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; provided, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger; provided, always, that the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such terms as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers."

Mr. Justice Field, in delivering the opinion of the court denying the contract, said:

> "It does not mater, in the present case, whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent paragraph, declaring a limitation upon the charges which the company may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that, so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. *It contains no stipulation, nor is any implied, as to any future action of the legislature.* If the exclusive right remain undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the legislature has, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated." (The italics are ours.)

In the course of the opinion, the learned justice takes occasion to refer to the fact that the theory prevailed at the time the charter was granted (1833) that a railroad was subject, like an ordinary wagon road, to the use of all persons who are able to place the necessary conveyances upon it. While the company was the owner of the roadbed, any other person could run cars upon it upon payment of established tolls.

The same theory, under almost similar charter provisions, inheres in the charter of 1850, under which the Louisville Company is here claiming a contract with the

state of Kentucky. We think that the case cited is analogous to and governs the case at bar.

In the two cases of Railroad v. Minnesota, 134 U. S. 418, 467, it was held that a charter provision giving power to the directors of the company to make rules as to rates of toll does not constitute a contract that it shall have the right, for all future time, to prescribe its rates of toll, which are thereby controlled by the legislature of the state.

In Smyth v. Ames, 169 U. S. 466, it was contended that, as to the Union Pacific, the state had no right to control the rate, because under a provision of an Act of Congress creating the road it was provided, as follows:

> "Whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running and managing of said road, shall exceed 10 per centum upon its cost, exclusive of the 5 per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law."

In holding that this was not the result, this court said:

> "Undoubtedly, Congress intended by that act to reserve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the states through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits."

In Turnpike v. Sandford, 164 U. S. 578, it was held that a grant, to each of two new corporations, of the powers, rights and capacities which had been granted

to a corporation which they succeeded, and to the property which is divided between them, does not confer on the new companies the exemption conferred upon the original company from legislation changing the rates of toll; and that, if a contract with a state relating to the exercise of franchises is susceptible of two meanings, the one restricting, and the other extending the powers of a corporation, that construction should be adopted which works the least harm to the state. That case came up on writ of error to the Court of Appeals of Kentucky. In the state court was reversed by this court, it was not merely fixing a maximum rate of toll to be charged does not constitute a contract between the state and the turnpike company, which deprives the state of all power thereafter to modify or regulate the rate of toll. While the state court (14 K. L. R. 689) it was held that an act because of any disagreement with the state court on this proposition, but wholly because the rate which the state had fixed was unreasonable.

In Commonwealth v. Covington Bridge Company, 21 S. W. 1042, a contract prohibiting the state from fixing rates was contended for, under the following charter provision of an act of the state of Kentucky, dated February 17, 1846:

> "That the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon with their goods, carriages, or animals of every description or kind: provided, however, that the said company shall lay before the legislature of this state a correct statement of the cost of said bridge, and an annual statement of the tolls received for passing the same, and also the cost of keeping said bridge in repair, and of the other necessary expenses of the company; and the said president and directors shall, from time to time, reduce the rates of toll, so that the net profits of said bridge shall not exceed 15 per cent per annum,

after the proper deductions are made for repairs and charges of other descriptions. Toll gates shall be kept, and tolls received at each end of the bridge, and the rates of tolls shall be posted up in some conspicuous place where toll is demanded.' On the 5th of February, 1861, the capital stock was increased to $1,000,000, and the company also authorized to issue one-half of the amount in preferred stock, provided 'that it shall be lawful to prefer such stock to the extent of fifteen per cent per annum, and no more.'"

In a well-considered opinion reviewing many authorities, the Court of Appeals of Kentucky, in ruling against the contention of contract, said:

"It is not pretended that the charter of the appellee, the Cincinnati & Covington Bridge Company, can be repealed, because there was no such power reserved in the grant, and the general law now found upon the statute book of the state, where this power is expressly reserved, was not enacted until after the grant was made; nevertheless, this power to regulate tolls over public ways, and in this class of cases, being the exercise of a governmental power, as must be conceded, its exercise may be resumed at any moment, unless by contract the state has surrendered it. We have found no decision of the Supreme Court, since this question as to the right of a state to surrender these governmental powers has been mooted, where private property has been devoted to public use under legislative grants, in which that court has construed the grant as containing stipulations precluding the state from exercising any control over the rates or charges the citizen is required to pay for its use. There are many changes in the condition of the country, as well as its people, during a period of 40 years. What may have been a reasonable rate of toll or income upon such investments 40 years ago would now be deemed exorbitant, and before this court should hold that the corporation had the right to a net income of 15 per cent per annum, to be paid by the public so long as the struc-

ture exists, or that this power of government had been delegated to those whose interests were adverse to the public, it should entertain no doubt of the purpose of the legislature to surrender by the words of the grant all future legislative control over the subject matter. The capital stock of this corporation at the time its charter was obtained, and the right to charge these tolls given, was only $300,000, and has been increased, from time to time, to $1,785,000, upon which sum the right to an income of 15 per cent per annum is claimed, although the amendments by which this increase of stock was made were enacted, as well as other amendments, since the passage of the general law reserving to the state the power to alter or repeal corporate grants."

By express decision in this case, the case of Hamilton v. Keith, 5 Bush, 458, which may be relied upon by the Louisville Company, was overruled. In the Keith case, by Section 6 of the charter of the Covington & Lexington Railroad, dated February 6, 1854, certain provisions were made as to rates. No right was reserved to the state to alter, amend or repeal the charter. Subsequently, on February 16, 1869, the sixth section of the previous charter was repealed and a different tariff of way freights established. Hamilton tendered a lot of freight and demanded its transportation at the rates established by the last act. This was refused and suit was brought. The state court held the act of 1869 to be unconstitutional, as violating the obligation of the contract of 1854. This decision, in this regard, is expressly overruled in the Covington Bridge case. On writ of error, it is true, the state court was reversed in the Covington Bridge case, 154 U. S. 205, but not because there was any difference of view as to the disposition of the contract contention, but wholly because the said act was an interference with interstate commerce, as the bridge spanned the Ohio river between Covington and Cincinnati.

In Railroad v. Miller, 132 U. S. 75, the Pennsylvania

Railroad contended for an exemption from consequential damages resulting from the construction of its railroad under a charter grant, similar in principle to that invoked by the Louisville Company. This court, in holding that there was no contract, said:

> "Nor will the exemption claimed from future general legislation, either by a constitutional provision or by an act of the legislature, be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words. In the present case, the statutory provisions existing prior to the Constitution of 1873, in favor of the defendant, can not be properly interpreted so as to hold that the state parted with its prerogative of imposing the liability in question, in regard to future transactions."

In Winchester Turnpike Company v. Croxton, 98 Ky. 739, 33 L. R. A. 189, the sole question for decision was whether an act of the legislature of Kentucky limiting the tolls to be charged by the turnpike company violated its contract with the state. The provision there relied upon as constituting a contract was contained in a charter granted in 1834, not subject to alteration, amendment or repeal, and was as follows:

> "Section 15. It shall be lawful for the president and managers . . . to collect and receive of and from all and every person or persons using said road the tolls and rates hereinafter mentioned, and to stop any person riding, leading or driving any horse, etc., . . . until they shall have paid toll agreeably to the following rates, to wit: For every twenty head of sheep, hogs or other small stock, six and a fourth cents, etc.
>
> "Section 21. And if at any time it shall appear that the clear income and profits will not yield a dividend of six per centum per annum on the capital stock so expended from the time of investing the same, then it shall and may be lawful for the president and

managers to increase the toll herein allowed so on each and every allowance thereof as will raise the dividend up to six per centum per annum; and if at any time it shall appear by the said abstracts that the said income and profits will yield a dividend exceeding twelve per centum per annum, then the said tolls shall be reduced so as to reduce the dividend down to twelve per centum per annum."

Subsequently, in 1893, by an act of the legislature, a different schedule of maximum rates was fixed for turnpike companies. In holding the provision relied upon not to constitute an irrevocable contract, the state court, in a well-considered opinion said:

"The determination by the state that for to-day, or for an indefinite time in the future, the charge of six and a fourth cents for every twenty head of sheep driven through the gates of the company would be a reasonable charge, is not a final settlement or determination of what may be reasonable sixty years hence; and the exercise once by the state of the right to fix the rate at what was then deemed reasonable is not in itself exhaustive of this power. Admittedly the rate fixed is reasonable—the legislative will so declares—but what is reserved? What is it that the public is interested in reserving? Manifestly that the rate should *continue* reasonable, and what was to be deemed reasonable in the future the legislature was to decide, whenever it chose to act, just as it exercised the right in the first instance. It is precisely as if in front of the company's charter the state had written, 'I grant you the right to charge certain fixed rates, and these may be increased or diminished within certain limits according as you make six or twelve per centum per annum on the capital invested. These rates and profits are reasonable, but I go no further. I do not say I shall always regard them reasonable. I reserve, as I do not expressly barter away, the power to provide reasonable rates for the traveling public of the future.'

"If the state had meant otherwise it would have

said that the rates as fixed herein shall remain unchanged forever, and, to sustain appellant's contention, these important words must be interpolated into the charter; and this is true, not only with reference to the special rates of toll fixed, but to the specified minimum and maximum rates of interest as well. The fixing of the tolls and the rates of interest allowable was but an expression of the legislative will that such tolls and such rates of interest were, for the time being, reasonable and lawful; and there is no promise, expressed or implied, that further and future regulation is finally abandoned by the state. . . . We are convinced that the General Assembly intended, by the charter in question here, merely to indicate the rates of toll then supposed to be reasonable, and to provide for a like reasonable profit, in the way of interest, without intending to abandon forever its power to exercise control over and limit the rates of toll and the profits of the company in the future. The doctrine that the state reserved to itself its governmental functions and powers of further regulating the property and franchises of corporations created by it, where the public were affected, was announced as early as in 1830 in the case of Providence Bank v. Billings, 4 Pet. 514, and we have no reason to believe that the representatives of the state contracted in ignorance of this principle."

In Ragan v. Aiken, 9 Lea 610, it was contended that the following provision of a railroad charter amounted to a contract, preventing the state from further changing the rates to be charged. (We quote from the charter, Section 14, Act of Tennessee, 1845, chartering the Nashville & Chattanooga Railroad, as set forth on page 615 of the case):

"That section confers upon the company the exclusive privilege to carry freight and passengers over the road, and adds: 'Provided, that the charge for transportation or conveyance shall not exceed 35 cents per hundred pounds on heavy articles, and 10 cents per cubic foot on articles of measurement

for every hundred miles, and 5 cents a mile for every passenger; and provided also, that the said company may, when they see fit, farm out their right of transportation on said road subject to the rate above mentioned.'"

In holding that this provision did not come to an irrevocable contract, the court, in a well-considered opinion, said (page 617):

"Railroad companies, as quasi-public corporations exercising franchises granted in consideration of accommodations afforded the public, are required and may be compelled, by the courts, to afford reasonable and impartial facilities of transportation. Their charges, when not regulated by charter or by statute, must be reasonable, and the courts will determine whether their charges are reasonable: Munn v. Illinois, 94 U. S. 113, 133; Chicago v. Iowa, 94 U. S. 155; Reg. v. Grand Junction Co., 4 A. & El. 16. If only a maximum limit of charge be fixed by charter, the reasonableness of other charges within the limit may be tested in the courts. If the charge for each service be fixed by law, or if the intention of the legislature is clear to only allow certain specified fares or tolls, leaving other cases unprovided for, the company must abide by its contract. . . .

"We are of opinion that no such intent appears in the language of our statute; that the object was to fix a maximum charge beyond which the companies could not go, and to leave the tariff of charges, within that limit, to the companies, subject to the rules of the common law and the regulating power of the courts and the legislature."

In Water Company v. Fergus, 178 Ill. 571, 53 N. E. 363, the Supreme Court of Illinois said, in passing upon a similar claim with reference to a contract for water rates:

"We do not think the adoption of the alleged ordinance by the village of Rogers Park, and the

acceptance and fulfillment of the conditions thereof by the appellant company, vested it, as with a property right, with the power to demand that the rates named in the ordinance should remain fixed and unchanged for the period in which it was licensed to occupy the streets of the village, or that the ordinance and its acceptance constituted a contract, or that any contract obligations arose by reason thereof. . . . The village exercised the power by incorporating in the ordinance a scale of prices as being just and reasonable maximum rates to be paid to the company by the consumer of water. This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants of the village should and would pay such rates for the period of 30 years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable. . . . Nor did the fixing of rates by the alleged ordinance of the village of Rogers Park vest in the appellant company an irrevocable right to exact such rates for the period it had been granted permission to occupy the streets, alleys and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same; that is, to exact only reasonable compensation. The power of the state to enforce that duty is not exhausted by its exercise in the first or any subsequent instance, but is continuous, and may be exerted from time to time, whenever necessary to prevent extortion by the agency created by the state to serve the public. Whenever the evil of extortion exists, the power to eradicate it may be successfully invoked. In the exercise of that power by the state, or by a municipality exercising the power by delegation from the state, there is no admixture whatever of any contractual element; nor does the corporation against whom the power is exercised obtain any vested property interest or property right in the scale of rates deemed at any particular time to

be reasonable maximum prices for the article to be supplied by the corporation."

Of like kind is the case of City of Danville v. Danville Water Company, 178 Ill. 299, 53 N. E. 118; id 180 Ill. 235, 54 N. E. 224, and Freeport Water Company v. City of Freeport, 57 N. E. 862.

In the case of City of Danville v. Danville Water Company, supra, the court says:

> "A legislative body can not part with its powers by any proceeding, so as not to be able to continue the exercise of such powers. It has no authority, even by contract, to control and embarrass its legislative powers and duties. Greenh. Pub. Pol. p. 317; Cooley, Const. Lim. p. 206; 15 Am. & Eng. Enc. Law, p. 1045; 1 Dill. Mun. Corp. Section 443. What might be proper for a city this year might not be proper the next year. It is impossible to determine with absolute or even tolerable certainty what changes a few years might work in the character and reasonableness of rates to be charged for water supply. No contract is reasonable by which the governing authority abdicates any of its legislative powers and precludes itself from meeting, in a proper way, emergencies or occasions that may arise. 'These powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of governments; and it is impossible that free government with restrictions for the protection of individual or municipal rights could long exist without its recognition.'" Gale v. Village of Kalamazoo, 23 Mich. 354; Milliken v. County of Edgar, 142 Ill. 528, 32 N. E. 493.

A great number of authorities of like kind and to like effect are reviewed in the opinion.

We believe that, in the main, where this court has held a contract to exist with reference to any surrender by a state of any part of its sovereignty to a corporation or person discharging a public duty, some provision amounting to an express exemption of the company or person from the future exercise of the power will be found. Such a provision is found in Gordon v. Appeal Tax Court, 3 How. 133.

There the provision was:

> ". . . that upon any of the banks in this state complying with the condition of this act, the faith of the state is hereby pledged not to impose any further tax or bonus upon the said banks during the continuation of their charters under this act."

In the case at bar, Section 18 of the charter relied upon expressly provides only a maximum. There are no words excluding the state from changing this maximum or fixing in the future, with the change of circumstances, a reasonable rate within it, nor are there any words exempting the road from the future control of the state in regard to its rates. The provision is very similar to that of the Nashville and Chattanooga charter reviewed by the Supreme Court of Tennessee in 9 Lea, supra. Moreover, Section 18 of the charter shows the contemplation by the state of facts such as was contemplated in the charter reviewed in the case of Banking Company v. Smith, 128 U. S. It contemplated the creation of a railroad on the order of a turnpike company. As shown in its bill, the main line was not constructed until about 1859. The condition with reference to which a maximum schedule of rates and tolls was fixed as reasonable for the time being in Section 18 has never existed, but, on the contrary, the theory of a toll road has been wholly abandoned. It is not claimed in the bill that any such road as was contemplated in Section 18 was constructed.

It will be observed that Section 18 of the charter of the

Louisville Company confers upon the president and directors of the company "power to charge for tolls . . . any sum not exceeding the following rates" (upon certain specified articles), and "for persons and any species of live stock, and every other description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort."

There is no word or expression in this or any other section of the charter, which indicates the intention of the legislature to make irrevocable the grant to charge the specified rates. In the absence of any rate being fixed in the charter, the company would have had the right to charge a reasonable rate. The rates named in the charter amount to the expression of the legislative opinion of what was regarded as reasonable.

In arriving at the legislative intent it will be useful to consider the language used in Section 18 in reference to taxation of the property of the company and the construction of parallel lines. It is there provided that the property of the company "shall never be taxed beyond the rate of tax imposed upon real estate, estimated upon the prime cost of the proposed works; nor will the legislature of this Commonwealth, *for the space of thirty years*, authorize any other railroad to be laid down, on a parallel line, with the one located by this company, extending from Louisville to the Tennessee line, approaching nearer than ten miles."

By this grant it was intended to give immunity from taxation, beyond a certain rate, for all time, and to assure the company that no parallel road should be constructed for thirty years. It certainly seems strange that the legislature, having used these strong expressions indicating a purpose to stay its hands upon the subject of taxation, and the chartering of competing lines, should have also intended to bind itself never to interfere with the rates named in the charter, and yet failed to use

like expressions of its purpose. It declares that it will "never" exceed a certain rate of taxation, and that it will not, for "thirty years," charter a competing line, but it only declares, as to rates, that the company has authority or power to charge certain sums. But how long may it charge these specified sums? The charter is silent. It is certainly fair to assume that if the legislature had intended to bind the state for all time, as to rates, it would have declared its purpose in plain and unmistakable terms. The use of these terms by the legislature in Section 18 shows that it fully comprehended the effect of its language, and that where it was intended to bind the state, appropriate expressions were used.

We submit that it would do violence to the legislative intent to construe as irrevocable this simple grant to collect certain rates.

That the manifest intention of the charter was only to establish what was then deemed to be a reasonable tariff of rates appears, we think, from not only the charter as a whole, but from the provisions expressly relating to the rates, and which are relied upon to constitute a contract. A limitation was put upon the power of the company in charging toll, but not upon the sovereign power of the state to change and regulate the rates as the public interests might demand. The language of the charter is:

> "They (the directors) shall have power to charge for tolls and the transportation of persons, merchandise and property, of any kind whatever, transported along said railway, any sum not exceeding the following rates, to wit: On all goods, merchandise or property, for every one hundred pounds transported over twenty miles, and under fifty miles, three and one-half mills for each mile; and for persons and every species of live stock, and every other description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort."

We here have a power conferred upon the company to charge any rate within a maximum for a haul over twenty miles and under fifty miles. Nothing is said with reference to a haul under twenty miles, or over fifty miles. With regard to such hauls there could hardly be a doubt that only a maximum was fixed. The language is that:

> "They (the directors) shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort."

This is a mere inhibition upon the company to charge rates exceeding a certain limit. If an irrevocable contract to govern for all time had been intended by either party, it can hardly be believed that such loose and indefinite language would have been used. The rates would have been made more specific, or, at least, they would have been made to apply to the entire road, and not limited to a haul between twenty and fifty miles. If a contract had been intended, it would have been expressed in the charter itself, and not by a mere reference to the maximum charges referred to in the charter of the different companies. That the intention was merely to make a regulation of the rates for the time being, then considered reasonable, is made more manifest when regard is had to the charter of the Lexington & Frankfort Railroad. It is evident that that railroad was intended to be run on the order of a toll turnpike. In reference to rates it speaks only of lump sums for a haul, without reference to distance. The provision is:

> "They shall have power to charge for tolls and the transportation of persons, goods, etc., . . . any sum not exceeding the following rates, to wit: For transporting, any distance, single packages weighing less than one hundred pounds, twenty-five cents, and at that rate, if such package weighs more than one hundred pounds."

Again, that charter not only fixes the maximum, but also the minimum of certain rates. It continues:

> "For transporting goods, produce, merchandise or property of any kind, not less than three and one-half mills, nor more than four mills, per hundred pounds' weight, per mile; for transporting passengers, not less than three and a half cents per mile, nor more than four cents per mile."

Then, after making a minimum charge, but no maximum charge, for coal, it proceeds to except divers and sundry articles from the rates established, and with reference to these excepted articles it reads:

> "The board of directors, or their agents, shall be, and they are hereby, authorized to contract specially for their transportation upon such terms as the parties interested may agree upon; provided, such rates shall in no case exceed 15 per cent over the rates allowed to be charged for heavy merchandise or produce."

We think it is evident, from these provisions, that the intention was merely to fix, as far as the rates were specified, a schedule of reasonable rates. If the parties intended a contract, we fail to see any reason why the state should have limited the railroad as to a minimum rate, or why the railroad should have desired such a limitation.

Again, if the parties understood they were contracting, then, with reference to the greatest part of the traffic, no rate whatever was fixed, but the railroad and its patrons were left to agree upon the rate. It is hardly intelligible that a contract of such moment would have been so loose and indefinite in its provisions. Again, if a contract was made, as contended by the road, fixing the maximum, so also was a contract made fixing the minimum rate to be charged by the road. According to the

allegations of the bill, the road has never charged even the minimum rate, but has continuously violated its contract in this regard, if it be a contract. If a contract, we fail to see upon what principle the railroad is privileged to violate or abandon such provisions as do not suit it, and yet compel the observance by the other party of such other provisions as it considers to its advantage. We think the abandonment by the company of the schedule of rates shows that it never understood or considered the provisions now relied upon to constitute an irrevocable contract. The alterations in the rates and subsequent regulations in reference thereto by the state show that the state never understood the matter now relied upon to be a contract.

We, therefore, contend that Section 18 did not make an irrevocable contract with the state which will preclude it to the end of time (the charter of the Louisville Company being perpetual) from preventing this railroad system, which is almost a monopoly in the state of Kentucky, exacting from the public extortionate rates and charges. If, however, such a contract was created by Section 18, we claim that it has been abandoned by the railroad.

In 1856, the state of Kentucky passed a general law providing that all charters and grants thereafter should be subject to alteration, amendment and repeal, as set forth in the appendix to this brief. After this general law, the Louisville Company received from the state of Kentucky numerous amendments to its charter enlarging its right and increasing its capital and affecting its rates. Under the charter of 1850, the capital of the company was $3,000,000. It has since grown to be $55,000,000. Under the charter of 1850, the company was to construct a line from Louisville to the Tennessee line, in the direction of Nashville, and embracing a railroad mileage of 139.88 miles, as stated in the bill of complaint. It has since constructed and purchased and now operates in Kentucky alone 1339.12 miles, and, in all,

3,000 miles. The population of Kentucky in 1850 was 982,405; in 1900 it was 2,147,174.

We have set forth in the appendix to this brief the provisions of the amendments of the charter of this company, which we think have a bearing upon the construction of its charter touching the matter now considered. It is our construction of these amendments that, even if Section 18 of the original charter created a contract touching its rates, it has since surrendered this contract by asking and receiving other privileges and submitting to be controlled by the state with reference to its schedule of rates; at least, they show that the state never supposed it was contracting away this important power. As all of these amendments were granted under the general provision saving to the state the right of alteration, amendment or appeal, the road can no longer claim an irrevocable contract. If the court, however, should construe the provision relied upon as still constituting an irrevocable contract, we submit that under the rules of strict interpretation adopted by this court touching such matters, it can have such contract only with regard to that line which it was authorized and empowered to construct under the charter creating the exemption, to wit, its main line from Louisville to the Tennessee line, in the direction of Nashville. This would not preclude the state from the exercise of its power to regulate the tariff of rates upon its other lines and branches in the state of Kentucky.

The Cincinnati Company claims a contract by virtue of the thirteenth and fourteenth section of an act approved February 13, 1872, which reads as follows (taken from the record of that case, pages 17, 18):

> "Section 13. The charge for transportation on said railway shall not exceed thirty-five cents per hundred pounds on heavy articles, and cents per cubic foot on articles of measurement, for every hundred miles, and four cents a mile for every passenger.

"Section 14. The taxes imposed on said line of railway and its appendages shall not exceed the rate imposed on other railroads within the state; provided, however, *that the trustees of the Cincinnati Southern Railway Company shall pay into the treasury of this Commonwealth an amount equal to fifty cents per capita for each through passenger across the Commonwealth of Kentucky, and twenty-five cents for each passenger for one hundred miles of travel on said road within the limits of the state of Kentucky; and the said trustees shall also pay semi-annually into the treasury of this Commonwealth an amount equal to one cent on each one hundred pounds of through freight shipped over said road*; and all payments due to the treasury under this act shall be made in the manner, and at such times, as may be established by the auditor of public accounts of this state, except the payments required by this act."

What we have heretofore said with reference to the Louisville Company, on the question as to whether such a provision does amount to a contract, applies with greater force to the provision just quoted.

The nineteenth section of the same act, however (R. 19), expressly provides against any contract feature. It reads as follows:

"Section 19. The General Assembly reserves the right to alter, amend or repeal this act, as provided in an act entitled, 'An act reserving power to amend or repeal charters and other laws,' approved February 14, 1856."

The company was relieved of the provisions of the fourteenth section, supra, by subsequent acts of the legislature, approved March 25, 1872, and February 4, 1893 (R. 20). Thus situated, we fail to see how the Cincinnati Company can claim an irrevocable contract fixing its rates.

Mr Tiedeman, in his recent work on State and Federal Control, says (page 980):

> "Where the charter of incorporation is taken subject to the reserved power to amend or repeal, the reserved power of amendment and repeal applies to this contract, that the corporation shall fix its own rates, as well as to any other rights and powers which might have been conferred by the charter."

That such a reservation, under a general law in existence at the time the charter is granted, or contained in the charter itself, leaves the state free to modify or change the rights or privileges granted, is no longer open to doubt.

> See Citizens Savings Bank v. Owensboro, 173 U. S. 636, and cases there cited.

For the operation of such a reserved power, as we understand it, it is not essential that a subsequent act or regulation should expressly repeal or amend the privilege previously granted. If there be an intent that the subsequent law should have a general operating force and apply equally to all persons throughout the state, this is sufficient, under the reserved power, to make it apply to corporations previously chartered, with special privileges that might conflict.

We do not think that there can be any serious doubt that the Act of March 10, 1900, was intended to apply to every railroad in the state. It says so in express terms. It seems, however, to have been the opinion of the circuit judge (R. Louisville Company, page 25), that some express repealing provision was necessary in order to make the act apply to the Louisville Company, even if the privilege granted did not amount to a contract.

Upon the whole case, therefore, we submit:

1. That the Act of March 10, 1900, is a valid exercise by the state of its police power in the regulation of the rates of railroad companies.

2. That no jurisdiction exists in the court to prevent the making of a rate, and that its jurisdiction can not be invoked until a rate has been made.

3. That neither the Louisville Company nor the Cincinnati Company is protected by an irrevocable contract touching its tariff of charges.

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APPENDIX.

Constitution of Kentucky.

Railroad and Commerce.

Sec. 209. Railroad commission—number—qualifications—powers—election—term of office—removal of. A commission is hereby established, to be known as "The Railroad Commission," which shall be composed of three commissioners. During the session of the General Assembly, which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the governor shall appoint, by and with the advice and consent of the Senate, said three commissioners, one from each Superior Court District, as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The commissioners so appointed shall continue in office during the term of the present governor, and until their successors are elected and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in section one hundred and fifty-two of this Constitution. The General Assembly may, from time to time, change said districts so as to equalize the population thereof; and may, if deemed expedient, require that

the commissioners be all elected by the qualified voters of the state at large. And if so required, one commissioner shall be from each district. No person in the service of any railroad or common carrier company or corporation, or of any firm or association conducting business as a common carrier, or in anywise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the railroad commissioners shall be regulated by law; and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing railroad commissioners. The General Assembly may, for cause, address any of said commissioners out of office by similar proceedings as in the case of judges of the Court of Appeals; and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said commissioners, and to impose proper penalties therefor.

Sec. 218. Penalty for charging more for short than long haul—power of commission. It shall be unlawful for any person or corporation, owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this state, to receive as great compensation for a shorter as for a longer distance: *Provided*, that upon application to the railroad commissioners, such common carrier, or person, or corporation, owning or operating a railroad in

this state, may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state, may be relieved from the operations of this section.

General Laws of Kentucky, adopted April 5, 1893.

Sec. 821. Three commissioners — duties. There is established a department in the state government to be known as the railroad commission, which shall be composed of three commissioners, one of whom shall act as chairman, and whose duty it shall be to see that the laws relating to railroad, except street, are faithfully executed, and to exercise a general supervision over the railroads of the state. Each of said commissioners is authorized to administer oaths, and two of them shall constitute a quorum.

Sec. 822. Office at Frankfort—secretary—salary of commissioners and secretary. The office of the commission shall be at the seat of government, and they shall be provided with suitable offices, furniture and stationery by the state, and may appoint a secretary at a salary of twelve hundred dollars per year, which shall be paid by the state; each commissioner shall, before entering upon the duties of office, take an oath to discharge faithfully the duties of his office, and they shall each receive an annual salary of two thousand dollars, and their actual, necessary traveling expenses while engaged in the discharge of their duties, which, together with the salary of the secretary, shall be paid in the same manner as the salary of the governor, except that before any expenses are paid the chairman of the commission shall file with

the auditor an itemized statement of said expenses, signed by him and approved by the governor, which statement shall be filed before any warrants can be issued therefor.

Sec. 823. Election of in 1885 and every four years thereafter. At the regular election in 1895, and every four years thereafter, there shall be elected one commissioner from each of the districts hereafter designated, by the qualified voters thereof, who shall take his office on the fifth Tuesday next succeeding his election, and hold the same for four years, and until his successor is elected and qualified.

Section 824 states what counties shall compose each commission district.

Sec. 825. Report to be made by companies each year to commission—what it shall specify. Every railroad company shall, on or before the first day of September in each year, make and transmit to the commission, at its office in Frankfort, under oath of the president or manager of the company, a full and true statement of the affairs of said company as the same existed on the first day of the preceding July, specifying: (Then follows a long list of things touching which the railroad is to report.)

Sub-section 34, under Sec. 825:

34. Whether the freight or cars of such transportation companies are given any preference in fees or order of transportation; and, so, in that particular? The commission may propound any additional interrogatories, which shall be answered by such company in the same manner as those specified in the foregoing section; and the commission shall furnish to each company, in proper time, blanks upon which to answer the foregoing and such other questions as may be propounded.

Sec. 826. Freight for foreign points to be examined by commission—duty of commission. Said commission

shall examine all through freight rates from points out of *this state to points into this state; and whenever they find* that a through rate charge into or out of this state is excessive or unreasonable, or discriminating in its nature, they shall call the attention of the railroad officials in this state to the fact, and to urge them of the propriety of changing such freight. And when such rates are not changed, it shall be the duty of said commission to present the facts to the Interstate Commerce Commission, and appeal to it for relief; and they shall receive, upon application, the services of the attorney general of this state, and into the condition, management, and all other matters concerning the business of railroads in this state, so far as the same pertain to the relation of such railroads to the public, and whether such railroad corporation, their officers and employes, comply with the laws of the state; and whenever it shall come to their knowledge, or they shall have reason to believe, that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporation or person guilty of such violation.

Sec. 827. Examination of officers and employes by commission—penalty for contempt. They shall have the power to examine, under oath, any person, or the directors, officers, agents and employes of any railroad corporation doing business in this state, concerning the management of its affairs, and to obtain information pursuant to this law; and shall have power to issue subpoenas for the attendance of witnesses, and to administer oaths; and any person who shall neglect or refuse to obey the process of subpoenas issued by said commission, or who, being in attendance, shall refuse to testify, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished for each offense by a fine of not less than fifty dollars, nor more than one hundred dollars,

or by imprisonment not less than ten nor more than fifty days, or both, in the discretion of the jury.

Sec. 828. Penalty for failing to make required reports or obstructing commission—jurisdiction of courts. Each officer, agent or employe failing or refusing to make, under oath, any report required by the commission, within the time required, or failing or refusing to answer fully, under oath, if required, any inquiry propounded by the commission, or who shall, in any way, hinder or obstruct the commission in the discharge of its duty, shall be guilty of a misdemeanor, and shall be fined for each offense not less than five hundred nor more than one thousand dollars; and it shall be the duty of the commission to prosecute the person offending; and the Franklin Circuit Court or the circuit court of any county through which the railroad runs, the officer, agent or employe of which has violated the provision of this section, shall have jurisdiction of such prosecution; and it shall be the duty of the Commonwealth's attorney to prosecute all indictments, actions and proceedings under this law.

Sec. 829. Complaints against companies—award of commission—proceedings upon. The commission shall hear and determine complaints under sections eight hundred and sixteen, eight hundred and seventeen and eight hundred and eighteen. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all the evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award, and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases,

against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceeding had thereon as in other ordinary cases. If a trial is demanded, the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be the same as in other ordinary cases.

Sec. 830. Improvements—when commission may order—notice and proceedings. Whenever, in the judgment of the commission, after a personal examination of the same, it shall appear that repairs are necessary upon any railroad, or when, from complaint made or their own knowledge, they shall have reason to believe that the tracks, bridges, tunnels or other structures of any company are in an unsafe or dangerous condition, or unfit for public travel, or that any additions to, improvements or changes in the stations or terminal facilities are needed for the convenience and security of the public, they shall give notice, in writing, to the company owning or operating such road, of the repairs, improvements or changes they deem proper and necessary, and shall afford such corporation an opportunity to be heard in reference thereto; and if the company shall neglect or refuse to make such repairs, improvements or changes within a reasonable time after such hearing, if a hearing is requested by the company, and the commission shall believe that such improvements or changes are proper and necessary after a hearing, if one is had, they shall lay the facts before the attorney general for his action, and shall

report the same fully to the next legislature; no examination, request, advice or report of the commission shall, in any way, affect the duties or obligations of said company or relieve it from any liability.

Sec. 831. Information obtained—when not to be made public. The commission shall not be required to give publicity to any contracts, leases or engagements obtained by them in their official capacity, if the interest of any company would thereby be injuriously affected, unless, in the judgment of the commission, the public interest requires it.

Sec. 832. Favors not to be accepted from companies by commissioners — penalty. The commissioners, nor either of them, shall, directly or indirectly, solicit or request from, or recommend to, any railroad company, or any officer, attorney, agent or employe thereof, the appointment of any person to any place or position, nor shall any company offer to them, or either of them, any place or appointment for themselves or other persons, nor shall they, or either of them, directly or indirectly, request, accept or receive any present, gift or gratuity of any kind, from any company. A violation of the provisions, or any of them, of this section shall subject the person or corporation so violating to a fine of not less than one thousand nor more than five thousand dollars, to be recovered by indictment as other penalties for violation of law are.

Sec. 833. Fees for copies of records. For a copy of any record on file in their office they shall charge and receive the same fees that are charged by the secretary of state for similar services, and shall cover into the state treasury any amount so received.

Sec. 834. Report of commission to be made annually and published. The commission shall annually, on the first day of December, make a report to the governor of all matters relating to their office for the preceding year, and such as will disclose the practical workings of the

railroads in this state, and such suggestions in relation thereto as they may deem necessary and proper, and shall have printed and lay before each legislature, within the first ten days of its session, five hundred copies of their reports for the preceding two years.

Sections 816, 817 and 818, referred to above, in Sec. 829, are as follows:

Sec. 816. Extortion—what is. If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this state, it shall be guilty of extortion.

Sec. 817. Discrimination—what is. If any corporation engaged in operating a railroad in this state shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

Sec. 818. Preference or advantage forbidden—rules defining same quantity of freight. It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. When one or more car loads of freight shall be transported at the same time for different persons, and for each shipper a car load or more, such shipment shall

be considered and taken as the same quantity of freight within the meaning of this law; and when less than a car load of freight, and over five thousand pounds, are transported at the same time for different shippers, and for each shipper over five thousand pounds, such shipment shall be considered and taken as the same quantity of freight; and when over five hundred pounds, and less than five thousand pounds, are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipment shall be considered and taken as the same quantity of freight.

An act, approved February 14, 1856, reserving the right of alteration, amendment and repeal as to all charters and grants thereafter made.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

Sec. 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution, as aforesaid.

Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter, and that this act shall take effect from its passage.

General Laws of Kentucky, previous to the Constitution of 1891.

An act in relation to common carriers, their agents and servants.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that all persons and corporations doing business as common carriers in this Commonwealth, whose rates of freight and passage are limited by law, shall be required to print and post, and keep posted, in some conspicuous place in each office occupied by them for freight and passenger purposes, a tariff of the local and way freights charged upon all such articles as are usually transported by them, and of any changes which may, from time to time, be made in such rates; and also a list of the rates to which they are limited by law, and a plain reference to the dates of the passage of all laws by which such limitations are imposed; which tariff and lists shall be signed by the superintendent or other principal managing agent of the person or corporation in whose name they are published.

Sec. 2. That any common carrier mentioned in the first section, who shall fail to cause to be printed, posted, and kept posted, as required by the first section, the tariff and lists therein mentioned, shall be subject to a fine of fifty dollars for each month during which such failure shall continue; and any superintendent or managing agent, who shall knowingly and willfully cause to be printed and posted, as aforesaid, a false tariff of the rates charged, or of the rates to which such carriers are limited by law, shall be subject to a fine of five hundred dollars for each offense. The fines imposed by this section

shall be recoverable by indictment, in the name of the Commonwealth, in any court having jurisdiction of similar offenses.

Sec. 3. Any common carrier mentioned in the first section, who shall charge and demand from the consignee of any article transported by him a greater rate of freight than that to which such carrier is limited by law, shall forfeit all right to demand or receive from such consignee any price whatever for the transportation of such article; and the consignee in such case shall be entitled to demand and receive from the agent of such carrier, in whose possession or control it may be, the immediate delivery of the article upon which such overcharge is made, the consignee paying to the carrier only such charges, if any, as may have been advanced by him on such article.

Approved March 9, 1867.

An act to prevent the railroads of this Commonwealth from charging more than the rates allowed by law. (From Supplement, Revised Statutes of Kentucky, p. 743.)

Section 1. That if any railroad company in this Commonwealth shall charge more than the rates allowed by their charters for the conveying of freight, the said company shall forfeit and pay to the person so charged double the amount of the freight bill, and the party shall have his action therefor in any court of competent jurisdiction against the company.

Approved February 17, 1866.

Acts amending the charter of the L. & N. R. R. Co., and charters therein referred to, so far as they relate to rates.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved January 17, 1856.

Sec. 2. That in addition to the foregoing sections, en-

acted by the state of Tennessee, and hereby enacted by the state of Kentucky, the following rights are vested and powers created, to be held and exercised by said company within the state of Kentucky: The said Louisville & Nashville Railroad Company are hereby vested with the power and authority to make agreements with any company or corporations incorporated by the laws of the state of Tennessee, to construct a railroad, in part or in whole, of the distance between Louisville and Memphis, and running in the direction of Louisville, whereby to secure mutual and reciprocal rights to the contracting parties, to run their respective roads through, from point to point, with or without change of cars or other machinery, and any other agreement which the parties may mutually make to facilitate trade and travel between the said cities of Louisville and Memphis. And the said Louisville & Nashville Railroad Company may, in arranging a tariff of tolls, make discrimination on such freight and travel as may run through from Louisville to Memphis, and from Memphis to Louisville, and such as may run in part on their road, and transhipped to another.

Sec. 3. That said company may, under the provisions of the thirteenth section of this act, from time to time, extend any branch road, and may purchase and hold any road constructed by another company, or *may agree on terms to receive the cars of other roads on their said road, but shall charge for the same the usual freight.*

An act to amend the charter of the Louisville & Nashville Railroad Company, approved February 6, 1858.

Sec. 6. That the Louisville & Nashville Railroad Company, for the main line and its branches, in making a tariff for freight and passengers, shall have the same authority that is vested in the Lexington and Frankfort, and Louisville and Frankfort Railroad Companies have by their charters and amendments thereto, and shall have

the right to plead and rely on the same limitation for the same causes of action provided for said railroad companies.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved February 28, 1860.

Sec. 2. That said company may make arrangements with other companies for through freights and passage from distant points on such terms as they may agree from time to time.

Sec. 3. This act may be carried into effect, the provisions of any other act to the contrary notwithstanding; but it is not the meaning or intention of this act to empower the board of directors for said railroad to charge a higher rate of tariff on way freight and passengers than is now established by law.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved January 8, 1864.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that when the Louisville & Nashville Railroad Company shall have taken up the bonds loaned said company by the state of Tennessee, for the construction of that part of said road that is within the said state of Tennessee, the whole of the thirteenth and fourteenth sections of an act entitled, "An act to amend the charter of the Louisville & Nashville Railroad Company," approved January 17, 1856, except the first seven lines of said thirteenth section of said act, shall stand repealed; and thereafter there shall be no difference between the stock and debts of the main line and branches, nor shall separate books be required to be kept, and all stock issued shall be that of the "Louisville & Nashville Railroad Company." *Provided, however,* that this act shall first be accepted by the stockholders at some annual meeting.

Sec. 2. The holders of certificates of stock of the main line and branches may surrender the same and have them reissued as above directed.

Sec. 3. This act shall take effect from its passage.

An act for the benefit of the Louisville & Nashville Railroad Company, approved March 2, 1865.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that the charter of the Louisville & Nashville Railroad Company be, and the same is hereby, amended so as to authorize said company to increase their rate of charges 25 per cent upon the amount they are now allowed by law to charge upon freight and passengers transported from Louisville to Nashville, or *vice versa: Provided*, nothing in this section shall authorize the company to increase their rate of charges upon way freight and passengers.

Sec. 2. This act shall take effect from its passage and continue in force five years.

An act to amend the act incorporating the Lexington & Ohio Railroad Company.

Sec. 2. That they shall be, and are hereby, permitted to charge for transportation of passengers, a distance of three miles and under, twelve and a half cents for each passenger: and for the transportation of produce and merchandise, and other articles paying by weight, when the distance is under five miles, they may charge the same compensation as though they transported five miles.

Approved December 22, 1831.

An act to amend the charter of the Frankfort & Louisville Railroad Company.

Sec. 2. All the rights, privileges and restrictions of the Lexington & Ohio Railroad Company, as they existed

under the charter of said company, from St. Clair street, in Frankfort, to the city of Louisville, except so far as they conflict with the charter of the Frankfort & Louisville Railroad Company, shall be, and they are hereby, revived and continued in full force, and transferred and covered, together with all the fee and right of way acquired and held by said company to the president and directors of the Frankfort & Louisville Railroad Company—provided, that this section shall not prohibit or interfere in any way with the right of the state of Kentucky, or her lessees, to extend the railroad now in use, or any other she may by law construct from Lexington to Frankfort, through Broadway street, in said town, to the river, or in any manner interfere with the rights and privileges granted by the state of Kentucky to the present lessees of the Lexington & Ohio Railroad, unless the written consent of the said lessees shall be first obtained.

Approved February 29, 1848.

An act to amend the charter of the Lexington & Frankfort Railroad Company, and Louisville & Frankfort Railroad Company.

Sec. 2. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that so much of the twentieth section of the aforesaid recited act as limits the freight to be charged by said company for the transportation of goods, produce, merchandise or property, on their railway, be, and the same is hereby, repealed; and said company shall have power to charge for tolls and the transportation of goods, merchandise, produce or property of any kind whatsoever, transported by them along said railway, any sum not exceeding the following rates, viz.: For transporting single packages, any distance, weighing less than one hundred pounds, twenty-five cents, and at that rate if such package weighs more than one hundred pounds; for transporting goods, merchandise,

produce or property of any description, weighing over sixty-five pounds to the cubic foot, not more than four mills per hundred pounds per mile; for transporting any goods, merchandise or property, weighing more than forty-five pounds and less than sixty-five to the cubic foot, not exceeding 15 per cent over the rates allowed to be charged for heavy merchandise; for transporting any goods weighing more than twenty and less than forty-five pounds to the cubic foot, not exceeding 30 per cent over the same rates; and that in the transportation of goods, merchandise or property, weighing less than twenty pounds to the cubic foot, said company shall have the right to estimate each cubic foot as weighing twenty pounds, and to charge for the transportation of the same at the rates hereby fixed. Silver and gold bullion, money of all descriptions, and mails, are excepted from the rates herein established, and the board of directors, or their agents, shall be, and they are hereby, authorized to contract especially for their transportation upon such terms as the parties interested therein may agree upon.

Approved December 21, 1850.

An act to amend the charter of the Louisville & Frankfort Railroad Company, approved February 23, 1856.

Sec. 4. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that said company shall have the same authority to charge for receiving, forwarding and storing packages consigned to them or their agents, or deposited in their warehouse or depots, or with their agents, for safekeeping, to be forwarded, as the Lexington & Frankfort Railroad Company has under the twentieth section of an act approved February 28, 1848.

Kentucky Statutes limiting railroad franchise to corporations.

Section 538. Any number of persons, not less than three, may associate to establish a corporation for the transaction of any lawful business, or to promote or conduct any legitimate object or purpose under the provisions of, and subject to the requirements of this article; but banking, building and loan, trust, insurance and railroad corporations shall, in addition to the provisions of this article, which are not inconsistent with the laws relating especially to them, be organized in the manner and subject to the provisions of such laws.

Sec. 539. Such persons shall execute articles of incorporation which shall specify:

(1) The name of the corporation, which shall be such as to distinguish it from any other corporation engaged in the same business, or promoting or carrying on the same objects or purposes in this state.

(2) The name of the city or town and county in which its principal office or place of business is to be located.

(3) The nature of the business, or objects or purposes proposed to be transacted, promoted or carried on.

(4) The amount of its capital stock, if any, and the number of shares into which the same shall be divided.

(5) The names and places of residence of each of its stockholders, and the number of shares of stock subscribed by each.

(6) The time when it is to commence, and the period it is to continue.

(7) By what officers or persons the affairs of the corporation are to be conducted, and the time and place at which they are to be elected.

(8) The highest amount of indebtedness or liability which the corporation may at any time incur.

(9) Whether the private property of the stockholders, not subject by the provisions of the law under which it is organized, shall be subject to the payment of corporate debts, and if so, to what extent.

Companies—Organization and Reorganization of.

Sec. 763. Corporators—number and powers—articles of incorporation—filing of—subscription per mile. Any number of persons, not less than seven, may associate to form a corporation for the purpose of constructing, operating and maintaining a railroad. Such persons shall execute articles of incorporation, which shall specify the name of the proposed railroad, the number of years the corporation is to continue, the amount of its capital stock, and the number of shares into which the same shall be divided; the number of directors, which shall not be less than five nor more than fifteen, and their names; the places from and to which, and the name of each county into or through which it is intended to be constructed, and its length as near as may be. Each subscriber to such articles shall set opposite his name his place of residence and the number of shares subscribed by him. Whenever two hundred and fifty dollars per mile has in good faith been subscribed, and twenty per cent thereof paid in in cash, to the persons named in the articles as directors, and an affidavit made to that effect by two of said named directors and attached thereto, a copy of said articles and affidavit shall be filed in the office of the Railroad Commissioners, and in the office of the Secretary of State; and when a certificate of such fact is delivered by the said officers to the incorporators, the persons who have subscribed such articles shall be a body-corporate by the name specified in the articles, and as such may sue and be sued, contract and be contracted with, have a seal, and change the same at pleasure; may

elect or appoint directors, who shall choose from their number such officers as may be necessary; may require from any officer or employe a bond for the faithful discharge of his duties, and prescribe such by-laws for its government, and exercise such powers as are necessary to the conduct of its business not inconsistent with law.

Sec. 562. If the franchise and property of any corporation is sold, the persons who may become the purchasers, at private sale or under the judgment of the court, may organize a corporation for the construction, operation and management of the same; and such corporation, when organized, shall have the same rights, privileges and franchises as have been granted to or acquired by the corporation purchased; and shall be subject to all the limitations, restrictions and liabilities imposed upon it; and, in addition thereto, shall be subject to all the provisions of this chapter. Such corporation shall be formed by articles of incorporation executed by the purchaser and his associates, and which shall, in addition to the requirements of Section five hundred and thirty-nine of this article, set forth a description of the property sold, and the decree under which the sale was made, if it was sold under a judgment, or if not, the deed conveying the property, the amount paid or to be paid, and to and by whom, and such other statements as may be deemed necessary. The articles shall be signed by the purchaser and his associates, if any, and a copy thereof recorded in the office of the Secretary of State; and if a railroad, in the office of the Railroad Commission; and when a certificate of such fact is delivered to the purchaser, the corporation shall be deemed to be organized, and shall have all the rights, powers and privileges, and be subject to all restrictions, limitations and liabilities of other similar corporations organized under this chapter.

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Supreme Court of the United States.

October Term, 1900.

Nos. 296, 297, 298, 299 and 300.

Charles C. McChord et al., Appellants,
vs.
Louisville & Nashville Railroad Co., Appellee.
And four other cases heard therewith.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

ROBERT J. BRECKINRIDGE, Attorney General of Kentucky,
LEWIS McQUOWN,
AARON KOHN,
ZACK PHELPS,
DAVID W. BAIRD,
Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Nos. 396, 397, 398, 399 AND 400.

CHARLES C. McCHORD et al., Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellees,

And four other cases heard therewith.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

In our original brief we considered the questions which were raised in the Circuit Court and such questions, as far as we could anticipate them, that would be raised here. Until the oral argument, however, we were not apprised of the question which now seems to be urged and relied upon almost exclusively for the affirmance of these cases. In the preparation of our original brief, we had not seen the brief of the appellees, and the object of this supplemental brief is to consider the points urged in the oral argument. Condensed, the theory of the appellees now urged upon the court is that due process of law within the meaning of the Fourteenth Federal Amendment, in relation to the fixing of railroad rates, is the right to resort before the enforcement of the law, to a judicial inquiry as to the reasonableness of the rates by a bill in equity, and thus by one action to have a final determination of the question. They further contend that if this be not true, the act of March 10, 1900, deprives them of any inquiry or defense that is sufficient or adequate. The right to a

judicial hearing is considered fully in our original brief from pages 53 to 69, inclusive. It is therein set out upon the consideration and citation of numerous cases, that the railroad is not denied such a hearing, if the statute be silent on the subject, or if it do not expressly provide that the rate fixed by the Commission shall be conclusive. It is to be noted that in the case at bar, the statute expressly provides that the rate which the Commission is to fix shall be a just and reasonable rate. Independent of all other questions, the members of this court, who, in the case of Railroad vs. Minnesota, 134 U. S., considered that the fixing of a rate, or rather the rate after being fixed by the legislature, was binding upon the court, held that where the statute provides that the rate shall be reasonable, the courts are granted jurisdiction to investigate the subject; thus, Mr. Justice Bradley, in an opinion concurred in by Mr. Justice Gray and Mr. Justice Lamar, in that case said:

> "I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable and leaving it there."

It results from this, together with other cases heretofore cited, that the Kentucky act, of March 10, 1900, did not contemplate excluding the court from inquiring as to the reasonableness of the rate, and therefore the legality of the law, when the Commissioners fixed the rate. It necessarily results, therefore, we submit, that under the Kentucky act the courts are given the right to grant the railroads this hearing. The only remaining question is as to whether a judicial hearing satisfies the mandate of due process, or whether the railroad is entitled to some peculiar kind of a hearing. The appellees contend for the latter proposition. It is our understanding of the adjudications of this court, that due process refers to functions and not to specific remedies. Thus, where according to the processes of common law, certain matters are enforced through legislative or administrative processes, due process is satisfied through the instrumentality of

these functions and the courts do not interfere therewith, and where judicial functions are required, it is sufficient that a day in court be granted. To hold that the railroads are entitled to any specific remedy, is, we think, to enlarge the operation of the Fourteenth Amendment and to read into due process limitations which have never heretofore been even intimated, and by virtue thereof grant to railroads an immunity and privilege, not of common right. It is sufficient to say, we think, that in the cases of Railroad vs. Wellman, 143 U. S.; Railroad vs. Gill, 156 U. S., and Fitts vs. McGhee, 172 U. S., together with other cases heretofore cited, that this court has held that due process with reference to the enforcement of rates, is satisfied, if the railroad have an opportunity to contest the validity of the law, either in defense of an indictment or a penal action. Each of those cases were of this nature. While the court, however, in those cases held that it was sufficient if the unconstitutionality of the rate could be shown, if it were unreasonable, and therefore unconstitutional in defense of the indictmnet or the actions, it does not appear in what way this defense was made. We think, however, it is clear that such a defense presents a pure question of law and is therefore, as suggested by Mr. Justice White, at the oral argument, justicial. It is well established that making the rate is legislative; that the rate when made, is a law and must be obeyed as such, unless, like other laws, it invades some constitutional provision, to wit: The Fourteenth Amendment, in not being reasonable. The indictment, as suggested, would charge that the railroad had violated the law in exacting a rate in excess of the rate made. The only question of fact for the jury to find would be whether or not an excess had been charged. If the railroad desired to raise the question as to the legality of the law, it could do so, either by demurrer or special plea. It is wholly indifferent to the present consideration, what the procedure would be. As yet no such question has ever arisen in the State courts of Kentucky. Regardless, however, of the procedure that the question is one of law, results from the fact that the issue pre-

sented is as to the constitutionality of the law under which the indictment is found. The question, therefore, at issue is, "Is there any law for the indictment?" This is purely justicial and is to be tried by the court, and not to be submitted to a jury. It is to be tried in advance of the submission of any question to the jury and must be settled by the court, and the rate found to be reasonable, before the jury acts on the question as to whether the rate has been exceeded. This, we think, answers every criticism of the appellees and is sound. Of course it remains, like every other question submitted to human tribunals, that different judges, as different juries, might disagree. But all of these questions could be appealed to the Supreme Court of the State, where, so far as the State is concerned, a uniform result could be moulded; and if not there, by writ of error, cases could be brought here, as stated in the case of Fitts vs. McGhee, 172 U. S. There is no room, therefore, for the contention that the railroads might be turned over to the caprice of a jury and different findings had by different juries, nor is there any room for the contention that the case of Louisville and Nashville vs. Commonwealth, 99th Kentucky, so much relied upon, has any bearing upon the question of what constitutes extortion, after the rate has been made. That the question under the Kentucky practice is justicial, is, we think, certain, from the following provisions of the Code of Practice: Criminal Code, Section 180:

> "Issues of law shall be tried by the court. Issues of fact in prosecutions for offenses, of which the punishment is limited to a fine of $16, shall be tried by the court. All other issues of fact shall be tried by a jury."

Section 181:

> "An issue of law arises on a demurrer to the indictment."

Section 182:

> "An issue of fact arises upon a plea of not guilty or of former acquittal or conviction."

Section 235:

> "All questions of law *arising during the trial* shall be decided by the court and the jury shall be bound to take the decision of the court on points of law as the law of the case."

Section 238:

> "If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal."

Section 271 provides that even upon the trial of a fact by the jury, a new trial may be awarded by the court for numerous grounds stated, among them: if the verdict be against the law or the evidence, or if the defendant had not had a fair and impartial trial.

Again, by Section 287, even upon a trial of question of fact by the jury, cause against the rendition of a judgment may be shown upon any ground that would be a cause for a new trial.

By Section 347, appeals to the Court of Appeals are allowed in all cases where the judgment is for a fine exceeding $50.

Section 175 provides:

> "The plea of not guilty is a denial of every material allegation in the indictment, and all matters of fact tending to establish a defense, other than former conviction or acquittal, may be given in evidence under it."

In such prosecutions as those provided by the Act of March 10, 1900, the defendant is not arrested, but under Sections 147 and 148, Criminal Code, is summoned, like defendants in civil actions, the offense, under Section 7 of the Criminal Code, being a mere misdemeanor. We think it necessarily results from these code provisions, that under the State practice, the question of the constitutionality of the law (the reasonableness of the rate being the same thing) would be a question of law to be tried by the court and with which the jury would have no concern. This must be the case, because of the fact, as repeatedly decided by this court, in the cases cited in the original brief, under the

head of jurisdiction, that the burden of proof to show the rate to be unreasonable, and therefore to invalidate the law which the railroad impugns and declares to be invalid, is upon the railroad, and this it must show affirmatively and by evidence which excludes all reasonable doubt on the subject. Whereas, upon a trial before a jury, under the State practice, every presumption is indulged in favor of the defendant, and its guilt must be proved, as well as every fact tending to show it, to the exclusion of a reasonable doubt. If the question were one for the jury's consideration, on a plea of the unconstitutionality of the act, the burden would be on the Commonwealth to prove, to the exclusion of a reasonable doubt, that the rate fixed is a reasonable rate. Of this we do not think the railroad could justly complain, and as a matter of fact, might be in a better position than it occupies, with reference to the burden of proof, by decisions of this court in this regard. The fact that in the trial of the question of law raised, to wit: the validity of the law of the indictment, requires the hearing of evidence by the court, does not change the issue from one of law to one of fact. In a great many questions of law, the court is required to hear evidence. This often occurs, even during the trial of a case before a jury. Thus, in Bishop's new Criminal Procedure, Vol. 1, Sec. 763, sub-section 3, it is said:

> "It (demurrer) is a submission to the court of the claim that assuming the facts alleged by the other party to be true, they do not in law sustain that for which they are put forth."

Again in Section 989, sub-section 1:

> "Necessity is a part of the law of the land, supreme within its sphere. There are facts upon which, if the court does not pass, it can not discharge its function; therefore, it decides them, thus."

In sub-section 2, he refers to the trial of facts, or rather the hearing of evidence by the court upon questions relating to the competency of witnesses. This, the author says "often involves

an inquiry of fact, and when it does, the judge alone settles it, the jury taking no part therein and having no power to revise his findings."

In sub-section 3 numerous other illustrations are referred to, among them the mental capacity of infants, the competency of experts, whether a confession was voluntary and whether a foreign law is or is not proved.

"The judge alone," says the author, "hears evidence (on these matters) and passes on the fact and not even need the jury be present."

If, however, we should be mistaken in this position, the fact remains that, under the act the railroad has its day in court, as the act can be enforced only through judicial process, and thus, as said in Fitts vs. McGhee, 172 U. S., the cases can finally be brought for review to this court. Such also was the decision in Railroad vs. Wellman, 143 U. S. and Railroad vs. Gill, 156 U. S. Neither of these opportunities, however, seem to satisfy the appellees' contention. We submit, however, that one fact concerning the appellees' contention should control these cases, and that is, if the court has jurisdiction before a rate is made to enjoin the legislative function of making the rate, a fortiori, would it have jurisdiction after the rate has been made and when the subject-matter becomes one of judicial inquiry, either by mandatory injunction or by mandamus against the Railroad Commissioners, to try the reasonableness of the rate, and therefore the constitutionality of the law in one action for the entire State? If so, the criticisms of the appellees are satisfied. The same facts and reasons which give jurisdiction now, would give jurisdiction then. If, under Section 821, Kentucky statutes, referred to in our original brief, and printed in full, on page 143, by which the Commissioners are required to see that the laws relating to the railroads are faithfully executed and to exercise a general supervision over them, puts the Commissioners into that touch and connection with the rate law referred to in Fitts vs. McGhee, 172 U. S., as gives the courts jurisdiction of them, in this case, before

the rate is made, then for stronger reasons the court would have jurisdiction to enjoin the rate, if it be unreasonable, or in all events, to inquire into its reasonableness, after it is made. In fact, if there be that connection, it is our belief that the court has such jurisdiction after the rate is made, though it has not before the rate is made; for the essential reason that the subject-matter, to wit: the making of the rate, being legislative, is not within the jurisdiction of the court, whereas the reasonableness of the rate, or its constitutionality, which is the same thing, is within the jurisdiction of the court. Or, in other words, is a matter into which the court has a right to inquire. Furthermore, if there be that connection of the Commissioners with the law, by virtue of Section 821, that the court has jurisdiction of them in relation to the rate laws, then we believe that there can be no question that both mandatory injunction and mandamus would lie after the rate is made. It is to be borne in mind that under the act of March 10, 1900, the Commissioners are not only required to make a reasonable rate, but to keep it reasonable or empowered, and in fact compelled (because may means shall) to revoke an unreasonable rate, if they shall have made one, or to revoke a reasonable rate, if it subsequently becomes unreasonable. This is a continuing duty. By Sections 475 and 477, Kentucky Civil Code, the court, upon a writ of mandamus, is to decide all questions of law or fact, and the writ is thus defined: "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction commanding an executive or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law. * * *"

It has been decided by the Supreme Court of the State, that the writ lies against a judicial officer, to compel him to act, but not to control his judgment. 18 B. Mon. 423; 82 Ky. 632; 83 Ky. 66; 85 Ky. 177. It also lies to compel officers or a public corporation to act in a specified manner as to matters concerning which they have no discretion. For instance, to compel a city

to repair street (3d Met. 494; 13th Bush 334), or to compel city authorities to levy a tax to pay an ascertained debt (11th B. Mon. 154; 18 B. Mon. 852; 2d Met. 64; 3d Bush 144; 84 Ky. 36). It lies to compel the auditor of the State to draw his warrant for a debt due from the Commonwealth (13 B. Mon. 150; 80th Ky. 336; 86th Ky. 23). It lies to compel a county court or judge to qualify a sheriff or jailor (4 Met. 236; 2 Duv. 243; 83 Ky. 451).

Under the Act of March 10, 1900, the Board of Commissioners have a discretion and judgment with reference to what rate shall be made, provided that at all times it be reasonable, and to have a discretion as to whether any shall be made, but they have no power to make an unreasonable rate, and it is their duty to revoke such, if it should be made. All these questions, however, we submit, arise after the rate has been made. Whether the process be injunction or mandamus, the question comes to the same thing, to wit: The revoking or cancellation of the unconstitutional rate. This is the extent of judicial interference, as repeatedly said by this court, especially in case of Reagan vs. Railroad, 154 U. S., and Smyth vs. Ames, 169 U. S. We therefore submit to the court that the fears of the appellees are wholly without foundation, and that if anything, the Kentucky Act is an improvement upon other acts, because it does not convert the Commission, who performs the legislative function, into public prosecutors and thus array them in antagonism to the railroads.

CONTRACT.

In the case of Ruggles vs. Railroad, 108 U. S., cited in our original brief, considerable weight was given by Mr. Chief Justice Waite, in finding the matters relied upon as not constituting a contract, to the fact that one section of the charter provided that the by-laws should not conflict with the constitution, laws of the State, or of the United States. Such a provision is found in the charter of the Louisville Company, as Section 12 of the Act of March 5, 1850, which reads as follows:

"Section 12 of an act approved March 5, 1850, chartering the Louisville and Nashville Railroad Company.

"Be it further enacted, That the said president and directors, or a majority of them, may appoint all such officers, agents, or servants, as they may deem expedient for the business of the company, and they may remove any of them at pleasure; that they, or a majority of them, may determine, by contract, the pay of such officers, agents and servants, and regulate, by by-laws, the manner of adjusting all accounts against the company; that they shall have power to erect warehouses, work-shops, depots, and all other buildings necessary for the transaction of the business of the company; that they shall have power to direct and regulate in what manner, and by what evidence, stock in said company may be transferred; and to pass all by-laws which they may deem necessary or proper for exercising the powers hereby vested in said company, and for carrying into effect this act Provided, the same shall not be contrary to the laws of the United States or of this State."

We set this out in order that the court may consider it in the light of the reasoning of the case supra. It is committed from the appendix of our original brief. In this connection, we desire to call the attention of the court to the fact, that by an oversight, or mistake, the counsel for the Louisville Company have not correctly copied into their brief the charter provision relied upon as constituting a contract, in the case of Ruggles vs. Illinois, 108 U. S. They must have copied from some other contract. Not a single one of the essential provisions relied upon in that case is set out in that brief. The court will find the charter provision correctly copied in our original brief, page 117.

The contention that the act of March 10, 1900, does not affect the rates of the Louisville Company in the absence of a provision expressly repealing its charter provisions touching its rates, is settled, we think, in our favor by the case of Louisville and Nashville Road vs. Commonwealth, 161 U. S., 677. In that case a contract was claimed by the Louisville Company, to

purchase parallel roads by virtue of a provision in its charter and that Section 201 of the Constitution of Kentucky, subsequently adopted, did not repeal its charter, even if it did not have an irrevocable contract with the State. Section 201 of the Constitution of Kentucky, reads as follows:

> "No railroad, telegraph, telephone, bridge or common carrier company shall consolidate its capital stock, franchises or property, or pool its earnings in whole or in part with any other railroad, telegraph or telephone, bridge or common carrier company, owning a parallel or competing line or structure; or acquire by purchase, lease or otherwise, any parallel or competing line or structure or operate the same; nor shall any railroad company, or other common carrier, combine or make any contract with the owners of any vessel that leaves or makes port in this State, or with any common carrier by which combination or contract, the earnings of the one doing the carrying are to be shared by the other not doing the carrying."

In passing upon this contention, this court in the case supra said:

> "* * * However broad the power of the Louisville and Nashville Company, under its charter of 1856, we are still confronted with the proposition that the proposed consolidation of these two railway systems is a clear violation of Section 201 of the Constitution, which forbids the consolidation of the stock, franchises, or property, as well as the purchase and lease of parallel and competing lines. Unless this section impairs the obligation of the contract contained in the charter, it operates as a repeal of any power that may possibly be deduced from such charter to purchase, lease or consolidate with any parallel or competing line."

The object of the constitutional provision, under consideration there, was a police regulation; the same is true of the Act of March 10, 1900, under consideration here. The regulation, by the provision of the act, is intended to be general, and words of repeal need not be included.

We respectfully submit that the judgment of the trial court in these actions should be reversed.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

Nos. 396, 397, 398, 399, and 400.

CHARLES C. MCCHORD, ET AL., - *Appellants*,

VERSUS

LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND FOUR OTHER CASES HEARD THEREWITH, - - - - - - - - *Appellees.*

Additional Brief for Appellants.

In view of the fact that the Court has ordered a re-argument of these cases, we take the liberty of extending our original brief and of replying to the main contentions relied upon by the appellants in their briefs and urged by them at the first oral argument.

It is to be borne in mind that the law, the validity of which is now assailed, has never been tested in any of the courts of Kentucky. As yet it is wholly untried, and we are therefore without any guide or precedent from decisions of the Kentucky courts as to whether there is any foundation for the fears indulged by appellees.

In our original brief we argue the proposition that the Court is without jurisdiction to entertain this suit because of the relaship of the Board of Railroad Commissioners to the enforcement of the rate law. In our first brief we contend that if the Rail-

road Commission has not such a relationship as devolves upon it the duty of enforcing the rate after it is made, then the Commissioners are not amenable to judicial process, under the rule laid down in Fitts v. McGhee, 172 U. S. 516.

We set out in our original brief and in the appendix the provisions of the law which bring the Commission in touch with the enforcement of the laws, and we now in this brief desire to present more at large those duties, to the end that this Court may determine whether or not the Board of Commissioners has such duties to perform with reference to the law after the rate shall have been made as will make them amenable to a suit in equity to enjoin the enforcement of the rate if an unreasonable rate should be made. We also in this brief enlarge our argument on the question of practice that is raised by the appellees as being the main ground upon which they assail the validity of the Kentucky rate law.

As we understand the argument of the appellees' counsel, their right to maintain these suits arises from their contention that if an unreasonable rate be made, they would be wholly without judicial redress. If, therefore, either by injunction or mandamus, the reasonableness of the rate can be tested, or if, by plea to an indictment, the question can be raised as one of law, there is an end to the appellees' fears.

We shall present our enlargement of these views in their order.

The Bills State no Cause of Action.

The bills in these cases are substantially the same. Each assails the law of March 10, 1900, upon the ground that the fixing of rates by the Commission will deprive each of them of its property without due process of law; that in fixing rates, the Commission will exercise judicial power, try and convict appellees

of extortion, and, as a punishment for the offense, lower their rates and deprive them altogether of the rate-making power. Notwithstanding the able arguments submitted in support of this contention, the bills are really without merit. Neither the substantive facts averred, nor the just inferences deducible from them, tend to show that the Commission has already trenched upon, or, if unrestrained, will in future overstep the limitations of the Constitution, State or Federal.

In the argument and briefs of counsel, it is conceded that the making of rates is "an admittedly legislative duty." In numerous cases decided by this Court and cited in the original brief, it has been held that this duty may be delegated to a commission, and that there is no distinction between the exercise of the function directly by the legislature, or mediately through a commission. Indeed, Mr. Justice Brewer, in Chicago & N. W. R'y Co. v. Day, 35 Fed. 875, seemed to be of opinion that the exercise of the power through the commission was preferable. In that case he said:

> "The reasonableness of a rate changes with the changed condition of circumstances. That which would be fair and reasonable to-day, six months or a year hence may be either too high or too low. The legislature convenes only at stated periods; in this State once in two years. *Justice will be more likely done if this power of fixing rates is vested in a body of continual session, than if left with one meeting only at stated and long intervals.* Such a power can change rates at any time, and thus meet the changing conditions of circumstances." (Italics ours.)

Notwithstanding the principles thus announced, the contention in all the bills is, that the commission, under the law of March, 1900, will, in the exercise of judicial power, try and convict the appellees of extortion, and inflict a lower rate, by way of punishment, and thus deprive them of property without due process of law.

It is respectfully submitted that this construction of the law is unwarranted, and that there is no averment of facts, in either bill, to support the inferences sought to be drawn by counsel.

The purpose of the law-makers is clear, and expressed in unambiguous terms. There is no unusual or extraordinary power conferred. The law seems to follow the lines laid down by Mr. Justice Brewer. It is averred in all the bills, and no doubt was so claimed pending the passage of the law of March, 1900, that the appellees were only charging just and reasonable rates. Doubtless some members of the legislature believed this to be true. For this reason, no doubt, the law did not arbitrarily require the commission to make a schedule of rates for all the roads at once, but rather provided for an investigation of the truth of the claims of appellees, as to the justice of their rates. In order that this might be done, it is provided that if the commission shall receive information, or complaint shall be made to it, that any company is charging or collecting extortionate rates, it shall hear and determine the matter (after notice to the company affected) upon evidence and argument of the parties. If such hearing develops the fact that the rates are reasonable, the commission can not interfere with the company complained against; but if, upon the other hand, it is ascertained that the rates are extortionate—or to use the words of the statute, if it is determined that the company has been "guilty of extortion"—then the commission is directed and empowered to "fix a just and reasonable rate, toll, or compensation, which said railroad company or corporation may charge, collect, or receive for like services thereafter rendered." Ten days after the schedule thus fixed is delivered to the offending company, it becomes the standard for its changes, and a failure to conform to the rates thus fixed is punished by fine. If changing conditions require it, the commission has power thereafter to modify or revoke the rate.

Counsel in argument proceed, however, upon the assumption that this investigation or hearing which takes place involves the exercise of judicial power, and that it is a trial which is followed by judgment, pains, and penalties. This is an erroneous view.

Mr. Justice McKenna (then Circuit Judge), in an elaborate opinion in Southern Pac. Co. v. Board of Railroad Com'rs, 78 Fed. 260, in discussing this question, said:

> "The commission undoubtedly exercises a function which the legislature would otherwise exercise. It should be as full with the commission as with the legislature, and in both subject to the same judicial investigation, as we have already seen it is, *and thereby giving to the railroads that protection to their rights and property which the Constitution guarantees.*" (Italics ours.)

Mr. Justice Bradley, in Railroad v. Minnesota, 134 U. S. 418, concurring in the view of the majority of the courts as to the delegation of the rate-making power to a commission, said:

> "I think it perfectly clear and well settled by the decisions of this Court that the legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and, finally, to decide and report. No one could have said that this was not due process of law. *And if the legislature itself could do this, acting by its committees and proceeding according to the usual forms adopted by such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners,* charged as the board in this case was, to regulate and fix the charges, so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might or it might not swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command, just as they would be at the command of the legislature which created it. *Such a body, though not a court, is a proper tribunal for the duties imposed upon it.*" (Italics ours.)

Nothing can add to this clear and explicit statement of the reason of the rule which has been approved by this Court. Instead of the rate fixed by the commission being a judgment, establishing guilt and inflicting penalties, it is simply a law establishing rates made after full and satisfactory investigation. If it should be violated, penalties may follow—not because the rate has been fixed, but because, as in the case of other penal statutes, the rule established by law has been disregarded. Placing the apple in the Garden of Eden did not bring "death into the world and all our woe." The penalty came as the result of the violated commandment.

In this connection the attention of the Court is called to the case of Louisville & Nashville R. R. Co. v. Commonwealth, 99 Ky. 132, relied upon by appellees to sustain their contention upon this point.

There the railroad company was indicted for extortion under this statute:

> "If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transporation of passengers or freight in this State, or the use of any railroad car upon its track or upon any track it has control of, or has the right to use, in this State, it shall be guilty of extortion." (§ 816, Ky. Stat.)

The only point decided in that case was that this statute was *void for uncertainty*. The court said:

> "There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act the criminality of which depends not on any standard erected by the law, which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

It will be perceived that this case can have no application here. Under the statute in question each jury erected its own standard of reasonableness. Without any possible means of knowing what that standard would be, the railroad company might violate it. After the act the rule was declared, in the varying opinion of juries, and punishment inflicted for its violation. The law under which punishment was adjudged, in the case just cited, was left by the legislature in such an uncertain state that it was impossible to tell what rule the offender would be judged by. On the other hand, the act of March, 1900, directs the commission to establish and publish a specific rate, which *shall be the standard*. The penalties denounced by this law can not be inflicted until this standard is established by the commission and *known to the company*. Under the one law punishment might be visited upon the company for violating an unknown and uncertain rule; under the other this can not be.

The argument now made against the supposed act of the commission could be made against any law enacted by the legislature fixing rates. Precisely the same results alleged to be apprehended from the act of the commission might be averred to follow the adoption of rates by the legislature; the rate-making power would be taken from appellees without notice or hearing, their charges lowered, and severe penalties inflicted upon the corporations and their employes if the law should be disregarded. Such an argument would be futile if made against a law enacted by the legislature. To use the words of Mr. Justice Bradley, "No one could say that this was not due process of law." There being no distinction between the exercise of the rate-making function directly by the legislature and mediately through a commission, it must follow that appellees' objections here are unavailing. It can not do indirectly that which it could not do directly. If the legislature has power to make a schedule of

rates, it must follow that the commission may do so within the limitations prescribed by this Court. The rate may be made by either legislature or commission, subject alone to judicial review as to reasonableness.

Has the Kentucky Commission a Duty to Enforce the Rate After it is Made?

The action of the commission being, in law, the act of the legislature by deputation merely, an injunction will not be granted to restrain the exercise of the function to make rates, because this would be an interference with the legislative power of the State.

In the case of New Orleans Water Works Company v. New Orleans, 164 U. S. 471, Mr. Justice Harlan, in a learned opinion, announced this general rule.

The rule was applied and considered by Mr. Justice Field, upon the circuit, in Alpers v. San Francisco, 32 Fed. 503. The complainant there sought an injunction to permit the passage of an ordinance which would impair the obligation of a contract existing with the city by which he had the right to remove and appropriate the bodies of dead animals. After stating the general rule, Mr. Justice Field said:

> "This no one will question as applied to the power of the legislature of the State. The suggestion of any such jurisdiction of the Court over that body would not be entertained for a moment. The same exemption from judicial interference applies to *all legislative bodies, so far as their legislative discretion extends.* . . . The courts can not, in the one case, forbid the passage of a law, nor in the other, the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, *its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts,* while the legislative body of the

> State, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative act threatened may be in disregard of *constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary.*" (Italics ours.)

Here the bills charge that the commission is about to proceed to fix rates; that is, to exercise the legislative function with which the State has invested it. There can be no difference in the passage of an ordinance by a city council and the adoption of a schedule of rates by the commission under the act of March, 1900. Each exercises legislative power by delegation from the State, and each is invested with a legislative discretion. When a municipality enacts an ordinance it becomes a law of the State, operative within its limits. When a commission makes a schedule of rates, it becomes the law of the State, as effective as if enacted by the legislature. Having the unquestioned right to proceed to make rates, it is submitted that the courts have no jurisdiction to restrain the exercise of this power by the commission, even if its act will beget a multiplicity of suits, impair the obligation of contract alleged to exist in favor of certain of the complainants, or reduce their rates below the point where a reasonable return for the investment can be received. The remedy, in such a state of case, is clearly stated by Mr. Justice Harlan in the New Orleans Water Works case, already cited (164 U. S. 471), as follows:

> "We repeat that when the city council shall pass an ordinance that infringes the right of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the State, it will be time enough for equity to interfere and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can

be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions, but that circumstance can not justify any such decree as it asks."

But it is earnestly contended by counsel for appellees, that after the rate is made there is no forum in which the execution of the law may be arrested and the question of the reasonableness of the rates determined, once for all. It is insisted that after the rate is made, and the companies notified, the act of the commission becomes a law to be enforced in the criminal courts by fines and penalties, and consequently injunction will not lie. In this view counsel for appellees are probably in error. At all events, we desire here to submit the question fairly for the decision of this Court.

The commission was created by § 209 of the Constitution of Kentucky. It was therein declared that

> "The powers and duties of the railroad commission shall be regulated by law; and until otherwise provided by law, the commission so created *shall have the same powers and jurisdiction, perform the same duties,* be subject to the same regulations, and receive the same compensation as is now conferred, prescribed, and allowed by law to the existing railroad commissioners."

At the time of the adoption of the Constitution, the law (now § 816, Ky. Stat.) denouncing a penalty for charging more than a just or reasonable rate was in force; and the law (now § 819, Ky. Stat.) was also in force which provided for prosecution by indictment for violation of the law against extortion, only on the request of the railroad commission "filed in the court having jurisdiction of the offense," or by action in the name of the Commonwealth, "upon information filed by the railroad commissioners."

§§ 816 and 819, Ky. Stat., have never been repealed.

By § 218 of the Constitution of Kentucky, it was declared to be unlawful for common carriers to charge a greater compensation for a shorter than a longer distance, under substantially similar circumstances. By this same section it was provided, however,

> " . . . that upon application to the railroad commissioners, such common carrier, or person, or corporation, owning or operating a railroad in this State, may, in special cases, after investigation by the commissioners, be authorized to charge less for longer than for shorter distances for the transportation of persons or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section."

By § 821, Ky. Stats., it is provided that

> "There is established a department in the State government to be known as the railroad commission, which shall be composed of three commissioners, one of whom shall act as chairman, *and whose duty it shall be to see that the laws relating to railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State.*"

By § 825 the railroads were required annually to transmit to the commission a full statement of their affairs in answer to interrogatories, which the commission was authorized to propound. By § 827 the commission was authorized to examine, under oath, any of the officials or employes of a railroad "concerning the management of its affairs, and to obtain information pursuant to this law"; and in aid of this power they were authorized to compel the attendance of witnesses, under a penalty of a fine of from fifty to one hundred dollars, or imprisonment not less than ten nor more than fifty days, or both, in the discretion of the jury.

By § 829 the commission was authorized to hear and determine various enumerated complaints against railroads, and by

§ 830 were authorized to inspect the tracks, bridges, tunnels, or other structures of railroads, and if found to be in an unsafe or dangerous condition, require them to be repaired. (See appellants' original brief, pp. 141–147, for laws here referred to except § 819, Ky. Stat., which is printed as appendix to this brief.)

It thus appears that the commission was given general supervision over the railroads of the State, and charged with the enforcement of the laws relating thereto. As a part of this duty it was required to enforce the law against any railroad company which should, by charging "more than a just and reasonable rate" denounced by § 816, Ky. Statutes, be guilty of extortion.

The Court in Louisville & Nashville Railroad Co. v. Commonwealth, 99 Ky. 132, held that § 816 was not enforceable, because *a reasonable rate was not fixed therein.* The law of March 10, 1900, gives to the commission authority to make the rate, and when this shall have been done, what was uncertain will be fixed and certain.

After making the rate under the act of March 10, 1900, it may be the *duty of the commission to enforce the same,* under the provisions of § 819, either by indictment or action. Consequently, after the rate is made, if it be an unreasonable one, injunction will lie against the commission to prevent the enforcement of the law. If so, the Court can then determine, once for all, whether the rate is reasonable. If unreasonable, the commission may be restrained from enforcing it and left free to make another.

In the case of the Southern Pac. Co. (78 Fed. 236), already referred to, it was contended that after the rate was made by the commission it became a law with which it had no further concern, and consequently injunction would not lie against the commission to test the reasonableness of the rates. The power of the commission, in reference to the enforcement of rates, was conferred by the law of California in the following words:

> "Said commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies, . . . and enforce their decisions and correct abuses through the medium of the courts."

This law, which was quoted in the opinion of Mr. Justice McKenna, provided, in substance, that after the rate was made by the commission a copy should be served upon the corporation affected thereby, and twenty days thereafter the rate should take effect. The bill was filed before the twenty days had expired. The Court held that it was the duty of the commissioners to enforce the rate, and that for this course injunction would lie. In discussing this point, Mr. Justice McKenna said:

> "That this construction will make the board more efficient there can be no doubt, and I am not disposed to interpret any ambiguity so as to take away a valuable power, and one so consistent with, and, may be, necessary to, the purposes for which the commission was created."

It is submitted that the connection of the commission with the enforcement of the rate, under the laws of Kentucky, is more intimate than in California. By the Constitution of the State (§ 218), the commission is authorized to suspend, upon investigation, its provision as to the long and short haul, thus, in effect, exercising the rate-making power; and by § 819, Ky. Stat., the commission is directly charged with the enforcement of the laws of the State against railroads, which *charge unreasonable rates.* If a schedule should be made under the law of March, 1900, fixing unreasonable rates, it would probably be the duty of the commission, under the provisions of § 819, as well as under § 821, *to enforce that schedule by causing indictments to be returned or actions to be instituted.* If so, injunction will lie against the commission to stay the enforcement of the law, in order that the reasonableness of the rates after they are made may be deter-

mined. If such remedy be open to the appellees, they virtually concede that their present bills in advance of the making of the rate are not maintainable. One thing, we submit, is certain, and that is, if the commission can be enjoined before it makes the rate, *a fortiori* can it after the rate is made, and it would seem that the courts would allow it to perform its legislative function and interfere only when the constitutional limitation of a reasonable rate is passed.

Injunction Does Not Lie on the Ground of Mere Fears.

Aside from the considerations already presented, the general rules of equity procedure will not warrant interference here by injunction. The danger sought to be relieved against lies altogether in apprehension. The only *fact* alleged in reference to the action of the commissioners is that they have requested copies of appellees' schedules. Upon this single fact rests all the allegations as to the character of rates which the commission will make.

The commission is charged with the sole duty of making just and reasonable rates. Every presumption must be indulged in favor of honesty and fairness. The bills do not assail the commission on this ground. Must it be conclusively presumed that because the unreasoning fears of appellees have found exaggerated expression in the averments of the bills, that a confiscatory rate is about to be established? Will not the Court rather, in the absence of averments of fact, give effect to the presumption of the law?

The danger at most is problematic. It is possible, but can the Court say it is probable? In such a state of case Judge Taft said:

> "We think the danger must be shown to be probable, and not merely possible, where the remedy by injunction is sought."
>
> Lake Erie & W. R. Co. v. Fremont, 92 Fed. 735.

The case of South. Pac. Co. v. Board of Railroad Com'rs, 78 Fed. 236, is strongly illustrative of this point. There the railroad commission had made an order reducing the grain rates of the company eight per cent. Another order was entered upon its record declaring that its general charges were twenty-five per cent too high, and resolving that "this board *proceed at once to adopt a revised schedule of rates in accordance herewith*, in order that the same may be in force on or before January 1, 1896." (Italics ours.)

The Court in that case enjoiped the enforcement of the eight per cent reduction, which had already been made, but refused the injunction as to the twenty-five per cent reduction which had been resolved upon. The ground of the refusal rests upon the fact that no decisive action had been taken, and the resolution had not been embodied in a schedule.

How much stronger is that case than this? There the opinion was expressed by the commission as to the amount of reduction to be made, and a resolution adopted pledging itself *at once* to make the schedule. If this was not adequate ground for reasonable apprehension of injury, can it be said that the mere request of the commission to be furnished with appellees' schedules will suffice?

In Ryan v. Williams, 100 Fed. 172, apprehended injury, as ground for injunction, was discussed. The injunction was sought by a minority stockholder to prevent the consolidation with another company, or any steps being taken to that end, in anticipation of the passage of a law by the State legislature to authorize such consolidation. The injunction was refused. The Judge said:

> "To grant an injunction in anticipation of a possible injury to arise under a law that may never be passed, is, to say the least, unusual. What complainant's rights may be and what relief should be afforded him in the event of the passage of such a law as he contemplates, can not now be anticipated."

In Erie Railway Co. v. Erie & W. V. Railroad Co., 100 Fed. 808, an injunction was sought to restrain the building of a proposed railroad upon the ground that if built it would be used in violation of a contract with complainant. In refusing the injunction, the Judge said:

> "I do not think the ground is sufficient to support the order that the Court is now asked to make. The injunction prayed for is directed, not against a diversion of traffic, but against the construction of a railroad, the allegation being that the defendant *may or will put the road to an unlawful use.*" (Italics ours.)

These and many other cases which might be cited are only declaratory of the general rule that the bill for injunction should directly state the facts which show the existence of the apprehended danger, and not merely inferences which do not necessarily flow from the allegations.

Spell. Ex. Relief, §§ 410, 982.

Practice.

In our supplemental brief filed after the first argument we contend that the validity of any rate which might be fixed by the Kentucky Commission under the act of March 10, 1900, in an indictment against any railroad for a violation of the rate is a question of law to be decided by the Court, though, for that decision, the Court would be required to hear evidence or refer the matter to a commissioner. A more thorough investigation of this question has convinced us that this position is sound. We are not to be understood, however, as conceding that an investigation of the question, as a question of fact, even by a jury, would violate any constitutional right of the railroads affected. That the constitutionality of the rate is a question of fair law is evident, we think, from the fact that any procedure

that might be taken by way of demurrer or plea to the indictment to question the rate would impugn the validity of the law.

As we have heretofore shown, the fact that the rate is made by a commission does not render the rate, when thus made, any the less a law than were it made directly by the legislature in the statute. The validity of the rate is, therefore, the validity of a law, and this is always a pure question of law, even though, like the existence of a law, it might entail the investigation of or inquire into a condition of fact.

In the case of Town of South Ottawa v. Perkins, 94 U. S. 260, involving the question as to whether or not a law of the State of Illinois had been passed in the manner required by the Constitution of that State, thus requiring an investigation of the records and journals of the legislature, Mr. Justice Bradley, in delivering the opinion of the Court, said:

> "And whether it be a law or not a law is a judicial question to be settled and determined by the courts and judges."

And again, in answer to a petition to reform, he said:

> "We also hold the existence of a law to be a judicial question to be decided by the court, though framed in form as an issue of fact. It follows that the court below on re-trying the case must itself be satisfied whether the law in question was or was not constitutionally passed, and the vote entered on the journals, and instruct the jury accordingly. The evidence or means of ascertaining this fact must be such as is legally applicable to such a case according to the laws of Illinois. But, strictly speaking, the issue is more properly referable to a court than to a jury. That it may be so framed the judgment will be amended directing the court below to award in each case a *venire de novo*, or to allow the parties to amend their pleadings, as they shall be advised, in order to refer the trial of the issue to the court instead of the jury."

Upon a similar question, in the case of Post v. Board of Supervisors of Kendall County, 105 U. S. 667, Mr. Justice Gray, in delivering the opinion of the Court, said:

> "Whether a seeming act of a legislature is or is not a law is a judicial question to be determined by the Court, and not a question of fact to be tried by a jury."

In Gardner v. Barney, 6 Wall. 499, upon a similar question, Mr. Justice Miller, in delivering the opinion of the Court, said:

> "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such questions, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

In the case of Board of Commissioners of Wilkes County v. Coler, 180 U. S., p. 506, involving a similar question, Mr. Justice Harlan, in delivering the opinion of the Court, after approving the rule laid down in South Ottawa v. Perkins, 94 U. S. 260, said:

> "In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The Court is bound to know the law without taking the advice of a jury on the subject."

To the same effect as the above authorities are:

Thompson on Trials, Volume 1, Section 1053.
Cooley on Constitutional Limitations (6th ed.), 162, 163.
A. & E. Ency. of Law (first ed.), 634, 639, 645.

In the last authority, on page 639, it is said:

> "The constitutionality of laws or ordinances is a question exclusively for the court. The validity of the regulations and by-laws of a corporation is to be determined by the

court, and to submit such a question to the jury is improper. Moreover, whether a given custom is valid or invalid is always a question of law for the court, and should not be left to the jury."

And on page 645 of that work it is said:

"Thus, the reasonableness of the rules of a board of trade, or of the rules, regulations, ordinances, or by-laws of a corporation, is a question for the court. So, whether fines, customs, or services are reasonable or not is a question for the court to decide."

A great number of authorities is cited in the notes to support the text.

In the case of Lyons v. Woods, 153 U. S. 663, Mr. Chief Justice Fuller, speaking for the Court, said:

"The question whether a seeming act of a legislature has become a law in accordance with the fundamental law is a judicial one to be tested by the courts and judges, and not a question of fact to be tried by a jury."

In Nesbit v. People, 19 Col. 450, 36 Pac. 224, the Supreme Court of Colorado lays down the rule thus:

"Every court must determine for itself what the law is upon a given subject, whenever it becomes necessary to apply the same in the discharge of its judicial functions. It is a matter of every-day experience that the court must decide what the common law is, and what the construction of statutes shall be. So, also, the court must decide as to the existence or validity of a statute whenever the same is in dispute; and, as a general rule, the same principle applies to a dispute respecting the existence or non-existence of constitutional provisions. Such dispute may become a question of fact; yet the court must determine it, and, in doing so, may resort to other evidences than the Session Laws of the State published by authority. It may seem paradoxical, but it is nevertheless true, that a question of fact respecting the existence or non-existence of a law is a question of law. It is a question to be determined by the court whenever it arises in the course of litigation, and not a question to be referred to some other tribunal for decision."

The case of State v. Searcy, 39 Mo. App., was a prosecution under a local-option law applicable to Greene County, outside of the city of Springfield, for the unlawful sale of intoxicating liquors. The defendant was convicted, and on appeal no question was made as to the propriety of the conviction, provided the statute known as the Local Option Law was properly shown to have been in force by a valid election at the time and place when and where the alleged offense was committed. On page 406 of the opinion it is said:

> "The court refused an instruction submitting to the jury the question whether the local option law had been adopted in Greene County, outside of the city of Springfield, and advising them that in order to find that it had been so adopted they must find that every element and fact necessary to constitute the establishment of it had been proved by the State. The court was right in refusing to give this instruction. The question whether a law which is to be a rule of conduct exists or does not exist is a judicial question, and can not be submitted to the ignorance or caprice of a jury. Thus it has been held that the question whether what purports to be an act of the legislature of the State was duly passed with the concurrence of the requisite majority of the members of both houses, as is required by the Constitution of the State, so as to become a valid law, is a question for the court and not the jury. (South Ottawa v. Perkins, 94 U. S. 260; Port v. Supervisors, 105 U. S. 667.) So it has been held that the existence of a city ordinance is to be proved by evidence addressed to the court and not to the jury. (Rouls v. Valcour, 58 N. H. 437; Hall v. Costello, 48 N. H. 176, 179.) This is merely a branch of the general principle that the judge decides questions of law and the jury questions of fact. (Co. Litt. 155, 156; Foster's Crown Law, 255, 256; Fougate v. Carter, 6 Mo. 267, 273; Hickey v. Ryan, 15 Mo. 62, 67.) This duty is none the less incumbent on the judge from the fact that in performing it he may be required to pass on questions of fact. . . . The court, therefore, rightly withheld the question from the jury."

To the same effect see the cases of

Comstock v. Tracy, 46 Fed. 170;
Creager v. Hooper, 83 Md. 504; 35 Atl. 161;
Jones v. United States, 137 U. S. 216.

We submit that if the judge, and not the jury, is to determine the question of the validity of a law which is assailed on the ground that the constitutional method of its enactment has not been pursued, so also should the judge, and not the jury, determine the validity of a law which is assailed on the ground that the legislature or other enacting body has no power to make it. If the invalidity of a law because of the means of its adoption is a question of law, *a fortiori* is it a question of law when its validity is assailed on the ground that it is not within the power of the State to enact.

While it is true that the invalidity of a law because of its violation of some constitutional principle generally appears on the face of the statute, yet it is also true that in some cases its invalidity depends upon the existence or non-existence of certain facts, and when this is the case the question to be decided is, nevertheless, a question of law. Of this kind would be an inquiry into the constitutionality of the law fixing a cruel and unusual punishment for the commission of a crime, and where the cruel character of the punishment could be ascertained only through evidence. In the cases involving the electrocution law of New York, the Supreme Court and the Court of Appeals of New York held that evidence could not be introduced to assail the validity of the law fixing the punishment on the ground that it was cruel, yet it is perfectly patent from those decisions, as well as from the consideration of the case on writ of error to this Court, that had such an investigation into the facts been admissible, the inquiry would have been one for the Court and not for a jury, as it involved only a question of law. The fact that the

invalidity of an act may appear from matters not apparent on its face does not operate to change the inquiry from one of law into one of fact, or transfer the decision of the question from the judge to the jury. Whether the invalidity appears upon the face of the act or from matters *de hors* the act, the inquiry is the same, to wit, its constitutionality, and this must ever remain a question of law.

The cases involving the electrocution law of New York, above referred to, are

People *ex rel.* Kemmler v. Durston, 55 Hun, 64.
Same case on appeal, 119 N. Y. 569.

On writ of habeas corpus it was complained that the law under which Kemmler was convicted violated that provision of the constitution prohibiting cruel and unusual punishments. The same question was raised by the defendant in defense of the indictment.

People v. Kemmler, 119 N. Y. 580.

In these cases an application for a writ of error to this Court was made from the judgment denying the writ of habeas corpus, and appears in the reports as

Ex parte Kemmler, 136 U. S. 436.

The New York courts held that the infraction of the constitutional provision prohibiting cruel and unusual punishments must appear on the face of the law, and that where this did not appear it was not competent for the court to hear evidence. It was not clear whether the court intended this as a general rule or only to apply to the peculiar features of that case, where the law itself showed that the legislature had gone to great extremes in investigating the question with a view of mitigating the pain

and suffering attending the death penalty. It clearly results, however, from the reasoning of this case, in the New York Reports, and from the opinion of this court delivered by Mr. Chief Justice Fuller, denying the writ of error, that had it been competent to make an issue calling for evidence as to whether or not the punishment was cruel and unusual, that issue would have been one of law, to be tried by the Court, and not an issue of fact to be tried by a jury.

Somewhat of a similar nature is the question which was before the Supreme Court of Maine in the case of State v. Wagner, 61 Me. 178. In that case a murder was committed on Smutty Nose Island, and the question raised was whether or not that island was within the County of York, in which the indictment was found. This issue required an investigation of facts, and the defendant attempted to have it submitted to the decision of the jury, but it was ruled by the Court that the question was one of law, to be decided by the Court, though requiring an investigation into facts. In that case, on page 184 of the opinion, it is said:

> "Under this condition of things, the presiding judge assumed to decide the question as one of law for the Court; and therein we think he did right. Neither the construction of charters or grants, nor the effect of previous acts of jurisdiction, as shown by records, can be a matter for the jury to determine. The force and effect of charters, grants, and records are for the Court. Wherever the question of jurisdiction depends on their construction and effect, it is purely a question of law for the Court. . . . Obviously, under such circumstances, there is nothing for a jury to pass upon, and a party charged with crime can not claim under any form of pleading to have such a question submitted to the jury for determination, nor complain if his request that it should be so submitted is overruled. Such a request is merely one of those stumbling-blocks in the way of justice which it is the business of the Court to remove."

And again, on page 185:

> "Even in the absence of distinct legislative recognition as part of our own State and of a particular county in it, we think questions whether the numerous islands along our coast lie within our borders and within county lines, and are subject to the jurisdiction of our courts are properly questions for the decision of the Court, and, once settled, must be deemed settled forever, and not subject to the varying verdicts of successive juries whenever a person charged with crime sees fit to claim to throw in a denial of jurisdiction as a make-weight to raise a doubt in a case otherwise clear. A criminal might as well call for the opinion of the jury upon the regularity of the judge's commission or the validity of the election of the Governor by whom he was appointed."

In Gard v. Callord, 6 Maule & Selwyn's Rep. 69, it was held that the reasonableness of a custom as to the amount of toll was a question of law to be decided by the Court, and not a question of fact to be decided by the jury. That was an action upon the case, in which the plaintiff declared upon a custom that all inhabitants within the borough of Modbury brewing in their houses any ale or beer for sale ought to grind at his mills in the borough of Modbury all the malt used by them and to pay him a certain toll. It was objected at the trial that the custom was unreasonable and void because the toll was excessive, but it was ruled by the judges that the question, whether reasonable or not, was a question for the Court, and not for the jury. On motion for a new trial it was contended that

> "Though in many instances it might be for the Court to determine as to what should be deemed reasonable, yet in the particular objected to it was otherwise, because the proportion of toll which was reasonable to be taken depended on a variety of circumstances and could not be judged of in the abstract, and therefore the price was a question for the jury alone."

In opposition to this, it was contended that

"In every case, whether reasonable or not, must in some degree depend on the facts, yet this does not preclude the Court from judging on that question as reasonableness of time, notice, etc."

In reply it was contended that

"Where the question was whether the toll was reasonable in its kind, there it might rest with the Court to decide, but where the question was only as to its quantum, the jury ought to determine it, under all the circumstances."

It will thus be seen that the question here at bar was fairly before the Court. The notes of the case give the decision of the judges thus:

"They (the judges) quote 2 Inst. 222, that what shall be deemed in law to be reasonable shall be judged, all circumstances considered, by the judges of the law, if it come judicially before them."

In Illinois Central Railroad v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138, the Supreme Court of Illinois, in holding that the question as to whether a railroad regulation be reasonable is always a question of law to be decided by the Court, say:

"The Circuit Court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony, as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable and therefore obligatory upon the passengers. The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railroad would be held liable, and in another presenting the same questions, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the road and to the public."

The ruling of this case is approved and followed in South Florida Railroad v. Rhodes, 25 Fla. 40, 23 Am. St. Rep. 506.

In Elliott on Railroads, Volume I, §202, the rule is stated thus:

> "The reasonableness of such regulations and of the manner of their enforcement in a given case has been held by some of the courts to be a question of fact for the jury. But it would seem that this must be a question of law for the court to decide if any fixed and permanent regulations are to be established, and the better authority holds it to be such, since one jury in a given case might pronounce the rule reasonable, while another jury in another case might decide the same rule to be unreasonable."

A great number of authorities is cited to support the text. In Wood on Railroads, Volume 2, §297, page 1198, the rule is stated thus:

> "Whether or not any particular regulation is reasonable depends not only upon its intrinsic character but upon the circumstances in which it is attempted to be enforced. There are some authorities, therefore, which hold that the question of reasonableness in this connection is one for the jury. But it is believed that this is not the better doctrine; authority and principle are both strongly in favor of the rule that such a question is one for the Court. Under any other view of the rule there could be no uniformity in the conclusions reached; one jury might declare a regulation unreasonable, and a succeeding one immediately declare it to be reasonable. Moreover, it is not always possible that juries can be made aware of the reasons which call for the regulation. The weight of authority, therefore, decidedly favors the rule that it is for the Court to determine the reasonableness of any regulation."

In the case at bar, after the Kentucky commission shall have made a rate, the question of the reasonableness of that rate or its constitutionality will become a pure question of law; and we think this question can be raised, as said by Mr. Justice Harlan in the Coler case, cited *supra*, by a demurrer to the indictment.

The defense of the railroad, if it exceed the rate fixed, to such an indictment will be that the rate is unlawful, and not that it has not violated the rate as made.

Contract.

Since the filing of our previous briefs in this case, this Court has affirmed the Supreme Court of the State of Illinois in the following cases, which are referred to in our original brief as supporting our contention that the charter granted to the Louisville & Nashville Railroad Company by the State of Kentucky does not amount to an inviolable contract in the matter of fixing maximum rates:

Freeport Water Company v. City of Freeport, 180 U. S., p. 587;

Danville Water Company v. City of Danville, 180 U. S., p. 619;

Rogers Park Water Company v. Fergus, 180 U. S., p. 624.

The question is there elaborately considered, and a great number of authorities are cited.

Since the first argument of these cases Judge Brannon, of the Supreme Court of West Virginia, has published a book entitled "The Fourteenth Amendment." Upon a consideration of the cases bearing on the police power of the States with reference to controlling rates, he concludes that this power can not be bartered away by contract; that it is necessary to sovereignty. (See pp. 192, 369.)

In our supplemental brief, hurriedly printed after the first argument, we wrongfully accuse the counsel of the Louisville company of error in their brief in copying the charter provisions

relied upon as constituting a contract in the case of Ruggles v. Illinois, 108 U. S.

We take this opportunity of withdrawing that charge and of confessing the error to be ours.

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APPENDIX.

§ 819, Ky. Stat.

Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees, to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued.

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Br. of Helm, Bruce, Bruce & Hines for Appellee.

Supreme Court of the United States

396

Filed Jan. 7, 1901.

CHARLES C. McCHORD, ETC., - - - - - - - - Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - Appellee.

BRIEF FOR APPELLEE.

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18672

Supreme Court of the United States.

CHARLES C. MCCHORD, ETC., ... *Appellants*,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD CO., *Appellee*.

BRIEF FOR APPELLEE.

I

In addition to our brief on other questions involved in this case, and which apply equally to all the appellees in the several cases now to be heard as one, we submit herewith our argument on the feature peculiar to the Louisville & Nashville Railroad Company.

That Company was organized under and accepted a Charter approved March 5, 1850.

By the 18th section of that Charter it is provided that the President and Board of Directors

"Shall have power to charge for tolls and the transpor-
"tation of persons, merchandise and property of any kind
"whatever transported along said railway **any sum** not
"exceeding the following rates, to-wit: On all goods, mer-
"chandise or property for every one hundred pounds trans-
"ported over twenty miles and under fifty miles, three and
"a half mills for each mile; and for persons, and every
"species of live stock and every description of freight and

"property, they shall charge no greater rate than is author-
"ized to be charged on the railway from Lexington to
"Frankfort."

Turning to the Charter of the last named road, we find the rates prescribed by Section 20, and copying only so much of that section as applies to rates, we find the language is as follows:

"That said Board of Directors shall have power to
"charge for tolls, and the transportation of persons, goods,
"produce, merchandise and property of any kind what-
"soever transported by them along said railway between
"Lexington and the Kentucky River, **any sum** not exceed-
"ing the following rates, to-wit: For transporting any dis-
"tance single packages, weighing less than one hundred
"pounds, twenty-five cents; and at that rate, if such pack-
"ages weigh more than one hundred pounds; for transport-
"ing goods, produce, merchandise or property of any
"kind, not less than three and a half mills, nor more than
"four mills per hundred pounds weight per mile; for
"transporting passengers, not less than three and a half
"cents per mile, nor more than four cents per mile for
"each passenger, with his baggage, not weighing more
"than forty pounds; except upon the article of coal,
"upon which there shall be charged not less than three
"cents on the bushel; but the charge on coal shall at no
"time be fixed at a rate which will not yield a profit on
"its transportation. Live stock, poultry and furniture;
"also feathers, wool, rags and other light, bulky articles,
"weighing not more than sixty-five pounds to the cubic
"foot; also silver and gold bullion, money of all descriptions
"and mails are excepted from the rates herein established;

"and the Board of Directors, or their agents, shall be and "they are hereby authorized to contract specially for "their transportation, upon such terms as the parties "interested may agree upon. Provided, such rates shall "in no case exceed fifteen per cent. over the rates "allowed to be charged for heavy merchandise or produce, "except for gold, silver, bullion, money of all kinds and "mails. The said Board of Directors and their agents "may charge for receiving, forwarding and storing such "articles and packages as may be consigned to them, or "deposited in their warehouses, or with their agents, for "safe keeping, or to be forwarded; and they may estab- "lish by their by-laws rates of storage and other fees for "such services. But they shall make no rule or regula- "tion giving any preference in transportation of goods "or other articles sent from other houses, stores, or "places; nor shall they make any difference in the rates "of charges on goods or other property consigned to "other persons for transportation on said road; but shall, "in all things, receive and receipt for goods and property "of every kind consigned to other persons on the same "terms as if consigned to themselves."

That Charter was approved February 28, 1848, and was amended February 26, 1849, as follows:

"SEC. 1. Be it enacted by the General Assembly "of the Commonwealth of Kentucky, That the minimum "rates for the transportation of persons, goods, produce, "merchandise and property of every kind, established by "the twentieth section of the 'Act to incorporate the "Lexington and Frankfort Railroad Company' except "that upon the article of coal, be and the same are hereby

"abolished, and the Board of Directors of said Company "shall have power to charge for tolls and the transportation "of persons, goods, produce, merchandise and property of "every kind (except coal) any sum they may deem proper, "not exceeding the maximum rates prescribed by the 20th "section."

Section 2 of the amendment of the Charter of appellee, approved March 20, 1851, is as follows:

"SEC. 2. That said Company shall have power and "authority to construct their road from the City of Louis- "ville to any point or place in the direction of Nashville, "Tennessee, and to connect the same with any railroad "extending to Nashville, on such terms and conditions as "the two companies may, from time to time, agree on, for the "through transportation and travel of freight and passen- "gers; and said Company shall have the same power and "authority to construct a branch of said road to the Missis- "sippi River, and any other branch said Company may "desire that the Charter gives them to construct the main "line, **and with the same rights and privileges, "and with the same duties and restrictions:** "and may for the main line and branches, acquire, as pro- "vided in the Charter and by this amendment, the right "of way one hundred and fifty feet wide, or more, if neces- "sary; and the quantity of acres of land which they are "authorized by the Charter to acquire and hold, shall be "exclusive of the right of way of the road and branches."

There has never been any attempt to reduce the rates prescribed by appellee's Charter, nor has the Legislature ever claimed, so far as we can judge by the legislation of fifty

years, the right to do so, unless that right was asserted by implication in the Act which is the subject of this controversy. (And we shall presently prove that the Legislature never intended to attempt any repeal of those Charter provisions.) It is true that within the last few years certain general laws have been adopted prescribing penalties against the railroad companies for charging and collecting more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in the State, and it is also true that there was an indictment against the Louisville & Nashville Railroad Company for the alleged offense of charging more than reasonable rates, and upon a trial the appellee was convicted and fined in the sum of five hundred dollars, but upon an appeal the judgment of conviction was reversed, the Court concluding its opinion in the following language:

"It may be observed further, however, that it would "seem singular if such a statute, even if in all respects "valid, could be enforced against a carrier whose rates as "fixed in its Charter are in excess of the rates alleged to "be excessive in the indictment. And this, not because "such rates are secured by an irrepealable contract, a mat-"ter not now considered, but simply because they at least "remain the legal rates until changed by law."

L. & N. R. R. Co. vs. Commonwealth, 99 Ky., 132, 143.

In March, 1900, the Legislature adopted a law granting to the Railroad Commission the very extensive powers described in our other brief. A copy of the Act may be found in this record at pages 5 and 6, and in the appendix to this brief. In the bill of complaint (Rec., 4) the provisions of appellee's Charter fixing the rates of charges are set out. It is further

alleged that **all of the Company's rates which it is now charging are less than the rates which the Company has the right to charge by its Charter contract.** (Rec., 7.) It is further alleged by the 9th paragraph of the bill as follows:

"IX. Defendants have called for and obtained from "your orator a list of rates fixed and charged by it for "transportation of freight and passengers over its railroad "in the State of Kentucky, for the purpose of considering "whether or not they shall be altered and reduced in "accordance with the terms of said Act, and are giving it "out in speeches and interviews that they intend to pro- "ceed at once under said Act, and, unless restrained by the "order of this Court, defendants will proceed at once to "hear and determine complaints under said Act, although "the same is in contravention of the Constitution of the "United States in all the particulars hereinabove set out, "and is therefore null and void, and will proceed there- "upon to **reduce your orator's rates** to such as they "think your orator should charge, and will thereafter at "pleasure modify and **still further reduce the rates** "**so fixed,** and if your orator does not observe the rates "so fixed, no matter how unjustly and unreasonably low, "your orator will be subjected to innumerable prosecutions "throughout the State of Kentucky, for failing to comply "with such rates fixed in this unconstitutional manner, "and it will be subjected to innumerable suits by con- "signors and consignees, who will claim the right to ship "at said rates so unconstitutionally fixed, and to sue for "any excess they may be charged over said rates, though "rightfully charged, and at the same time all your orator's "officers and agents and servants, though perfectly innocent

"of any offense, and though merely assisting your orator "to maintain its constitutional rights, will be indicted, "prosecuted and heavily fined, to the great demoralization "of the public service which your orator is bound to ren- "der, and so it is, unless said defendants are restrained by "the order of this Court from proceeding under said Acts, "your orator's contract rights will be impaired, it will be "deprived of its property without due process of law, "denied the equal protection of the law, and subjected to "great, irreparable wrong and injury, and to a vast multi- "plicity of prosecutions and actions in the courts of said "State."

A demurrer was interposed to this bill, thereby of course confessing its allegations that appellee's rates are already lower than its Charter gives the right to charge, and that appellants are about to reduce them further, thus subjecting appellee to innumerable criminal prosecutions and civil suits for failure to observe this attempted reduction. The demurrer being overruled, the appellants declined to answer and stood by the demurrer, and have appealed to this Court from the final judgment of the Circuit Court perpetuating the injunction against the appellants which restrained them from

"entertaining any complaint against the appellee for fix- "ing any rates of toll or compensation which appellee "may charge or collect or receive, or from entering any "such rate, toll or compensation on the record of their "office, or signing the same, or mailing any copy thereof "to any officer, agent or employe of the appellee, or from "taking any action whatever against or in relation to the "appellee under the Act of March 10, 1900, entitled 'An "Act to prevent railroad companies or corporations owning

"and operating a line or lines of railroad, and its officers, "agents and employes, from charging, collecting or receiv- "ing extortionate freight or passenger rates in this Com- "monwealth, and to further increase and define the duties "and powers of the Railroad Commission in reference "thereto, and prescribing the manner of enforcing the "provisions of this Act and penalties for the violation of "its provisions', approved on the 10th day of March, 1900."

On the branch of the case treated in this argument, the opinion of the Circuit Court is as follows:

"As applying specially to the Louisville & Nash- "ville Railroad Company the Court is further of opin- "ion that the Act can not be maintained, because, without "attempting directly, and probably not at all, to repeal "the provisions of the Charter of that Company as to max- "imum rates, it still leaves it within the power of the Com- "mission to make it a crime for that railroad to charge the "rates which its Charter expressly authorizes. Again, it "is not to be inferred that, even if the Charter of this Com- "pany can be amended, it was done by implication by the "Act before us. And still again, as the Charter of that "Company was passed before 1856, when the general law "was first enacted reserving to the State the power there- "after to amend all Charters of corporations, it probably "can not be changed at all without its consent, which it is "not pretended has been given. But whether so or not, it "can only be done, if at all, by language which is plain and "unmistakable, and not merely by so doubtful an implica- "tion as is presented here." (Rec., 25.)

II.

In this argument we shall maintain:

First—That the Legislature has by words of **grant,** not merely of limitation, given by an irrepealable contract, the right to the appellee to fix its own rates within the maximum limits prescribed, "to charge **any sum not exceeding** the following rates," etc.

Second—That whether the Charter provisions fixing the rates are subject to repeal or not, they have not been repealed, and on the admitted allegations of the bill the injunction should have been granted.

For the convenience of the Court we publish in the appendix to this brief—

1. The Act which is the subject of controversy and which for brevity we shall call the McChord Law.

2. The Charter provisions relied upon as constituting the contract fixing the rates of the appellee.

3. So much of the statute relied upon as constituting the contract in each of the cases in which this Court has had under consideration a subsequent statute alleged to be inconsistent with the statute claimed in that case to constitute the contract. The statute will in each case be found under the style of the case in which it is considered, so that this Court may readily compare these different statutes with each other and with the Act relied upon in this case as constituting a contract. We have not always been able to quote literally from the statute, but in such cases the substance of the claim, as gathered from the Court's opinion, is given.

The consideration of this question is not complicated by any power of alteration or amendment reserved in the Charter or any of its amendments, or by a general law.

The appellants rely upon a number of cases as being inconsistent with our contention in this case. The cases relied upon by them are: C., B. & Q. R. Co. vs. Iowa, 94 U. S., 155; Ruggles vs. Illinois, 108 U. S., 526; The Railroad Commission Case, 116 U. S., 307; Georgia Railroad & Banking Co. vs. Smith, 128 U. S., 174; Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362; Covington, etc., Turnpike Co. vs. Sanford, 164 U. S., 586; Smyth vs. Ames, 169 U. S., 466; C., M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418; Pennsylvania R. R. Co. vs. Miller, 132 U. S., 75; Fertilizing Co. vs. Hyde Park, 97 U. S., 659; Winchester Turnpike Co. vs. Croxton, 98 Ky., 739; Laurel Park & Sandy Hill R. Co. vs. West Va. Transportation Co., 25 W. Va., 324; Regan vs. Aiken, 9 Lee (Tenn.), 610. A number of these cases can be disposed of without special notice, because they so palpably lack any application. Thus in the case of Smyth vs. Ames, 169 U. S., 466, there was no contract claimed or involved. In C., M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418, the Charter provided that the Directors of the corporation should have the power to make all needful rules, regulations and by-laws touching the rates of toll and the manner of collecting the same. There was no other contract provision relied upon. This case is entirely governed by the principles laid down in the case of Ruggles vs. Illinois, 108 U. S., 526, the effect of which was to hold that the by-laws must not be inconsistent with the laws of the State then existing or thereafter enacted. Pennsylvania Railroad Co. vs. Miller, 132 U. S., 75, involved simply the construction of a statute, and there was no question of contract concerning rates involved in the case. The Fertilizing Co. vs. Hyde Park, 97 U. S., was a case which involved the exercise of police power in a case where the health of the inhabitants was involved. The Court held, first, that there was ample space within the

territorial limitations described by the Act in which the business could be carried on, and therefore it was proper to abate the nuisance in the village of Hyde Park, and second, that the Legislature could not make a contract injurious to health. Mr. Justice Miller wrote a separate opinion concurring in the main opinion upon the first ground stated.

The remaining cases will be considered more in detail.

In the case of C., B. & Q. R. Co. vs. Iowa, 94 U. S., 155, it was claimed by the appellant that under its Charter and the Constitution and laws of Iowa which existed at the time of its organization the Company had the right to fix the rates of compensation for transportation of persons and property over its road; that the laws of the State became a part of its Charter and constituted a contract between the Company and Iowa, the legal effect of which was to give the Company the right to fix and regulate its own rates free from legislative control. There was no pretense that the rates which might be charged, or even that the maximum rates which might be charged, had been specified by the Legislature. The Legislature in that case could not have been said to have exercised its judgment as to the reasonableness of the rates in any way whatsoever, and the Court holds that under such circumstances it was proper for the Legislature to regulate the rates of the road. In delivering the opinion, however, Chief Justice Waite said:

"But when the Legislature steps in and prescribes a "maximum charge, it operates upon the Company as upon "an individual. It was within the power of the Company "to call upon the Legislature to fix permanently this limit "and make it a part of the Charter. . . . If that had "been done the Charter might have presented a contract "against legislative interference."

In Ruggles vs. Illinois, 108 U. S., 506, Section 6 of an amended Charter which was relied upon declared:

"That the Company shall have power to make, ordain "and establish all such by-laws, rules and regulations as "may be deemed expedient and necessary to fulfill the "purposes and to carry into effect the provisions of this "Act, and for the well-ordering, regulating and securing "of the affairs, business and interests of the Company, "provided that the same be not repugnant to the Con- "stitution and laws of the United States or of this State "or repugnant to this Act. The Board of Directors shall "have power to establish such rates of toll for the convey- "ance of persons or property upon the same, as they shall "from time to time by their by-laws determine, and to levy "and collect the same for the use of said Company. The "transportation of persons and property, width of track, "and all other matters and things respecting the use of "said road shall be in conformity to said rules and regula- "tions as the Board of Directors shall from time to time "prescribe."

As we have heretofore noted, the Court holds that a by-law must be at all times consistent with the laws of the State existing at the time the by-laws are made, or thereafter enacted.

Mr. Justice Harlin in concurring in this opinion at page 537 extracts from the authorities certain principles, as follows:

"These cases establish, among others, these principles: "1. That the Charter of a railroad corporation is a con- "tract within the meaning of the contract clause of the

"Federal Constitution. 2. That such corporation may "be protected by its Charter against absolute legisla- "tive control in the matter of rates for the carriage of "passengers and freight. 3. That when the Charter is "granted subject to such regulations as the Legisla- "ture from time to time may provide, or subject to the "authority of the Legislature to alter or repeal it, in "either of such cases, the Legislature has the same power "over rates or tolls that it had when the Charter was "granted. 4. In the absence of statutory regulations upon "the subject it is necessarily implied from the occupation "of a railroad corporation that it shall exact only reason- "able compensation for carriage."

In the Railroad Commission Case, 116 U. S., 307, the Act relied upon as a contract declared:

"SEC. 12. And be it further enacted that it shall be "lawful for the Company hereby incorporated from time "to time to fix, regulate and receive the toll, and charges "by them to be received for transportation of persons or "property on their railroad or way aforesaid hereby au- "thorized to be constructed, erected or built, or upon any "part thereof."

Again in this case the legislative judgment as to the reasonableness of the rates or prescribing a maximum of rates is wholly wanting, and the statute simply gives the road a right which would have been implied without the statute, viz.: the right to collect tolls for services performed. The Court held that this statute did not deprive the State of its power within the limits of its general authority as controlled by the Constitution of the United States, to act upon

the reasonableness of the tolls and charges fixed and regulated by the Company. In the course of the opinion, however, it is said:

"This is not in conflict with the judgment of the "Supreme Court of Mississippi in Railroad Commission "vs. Yazoo & Mississippi Railroad Co. in which it was "decided that the power had been surrendered in favor of "that Company because in that Charter a maximum of "rates was fixed. In the opinion, a copy of which has "been furnished us in advance of its publication in the "regular series of reports, the Court says distinctly that 'a "grant in general terms of authority to fix rates is not a "renunciation of the right of legislative control so as to "secure reasonable rates. Such a grant evinces merely a "purpose to confer power to exact compensation, which "shall be just and reasonable. It is only where there is "an unmistakable manifestation of a purpose to place the "unrestricted right in the corporation to determine rates "of compensation that the power of the Legislature after-"wards to interfere can be denied.'" (Page 330.)

The Mississippi case referred to by the Court is reported under the style of Stone vs. The Yazoo & Mississippi Valley R. R. Co, in 62 Mississippi, page 608.

The sixth section of that Charter gave to the Directors of the Railroad Company the power to fix the rates provided it should not exceed certain specified rates.

The Mississippi Court held in construing that Charter that so long as the Company did not exceed those rates that it had a contract right to charge them, of which it could not be deprived by subsequent legislation, and that opinion was before this Court at the time it rendered its opinion, and as

we have seen was approved by it. The opinion in the Mississippi case was delivered by Chief Justice Campbell. The Court, while not quoting literally from the statute, states its effect as follows:

"Section 6 of the Charter of the appellee confers on "the company power to fix from time to time by it Board "of Directors the rates at which it will transport persons "or property over its railroads, provided they shall not "exceed the maximum specified in the Act." (641), and speaking of the power thus granted said:

"That it was the legislative intent to vest in the appel- "lee the unrestricted right to fix rates within the limits "prescribed by the Charter is clear; that this was a valid "contract by the State, obligatory and inviolable by it, we "regard as settled authoritatively by Federal and State "decisions too numerous for citation.

"If anything is or ever can be settled in American con- "stitutional law, the sanctity and inviolability of a con- "tract between a State and individuals in the shape of a "Charter for a business enterprise, accepted and acted on "by the corporators on the faith of its terms and provis- "ions, must be so regarded.

"The appellee has the unquestionable right from time "to time, by its Board of Directors, to fix the rates at "which it will transport over its railroads, provided those "rates shall not exceed the maximum prescribed by the "Charter. That is the contract. These terms were "expressly made. On the faith of them capital was "invested and the enterprise set on foot. It is not allow- "able now for one of the contracting parties to interfere "with the exercise by the other of its plainly granted

"rights. They are secured beyond the reach of legisla-
"tion and can not be impaired. The State can not, by
"an act of its Legislature, abdicate the right to govern
"artificial as well as natural persons, but it may create
"corporations, and where they are not a part of the
"machinery of government, the franchise can not be
"resumed by the Legislature or its benefits be essentially
"impaired without the consent of the grantee. To hold
"otherwise would be revolutionary and disturb the founda-
"tions of society as moulded by the judicial utterances
"of half a century of constitutional government in
"America."

The next case is that of the Georgia Railroad Co. vs. Smith, 128 U. S., 174. This case is particularly relied upon by the appellants.

By the twelfth section of the Company's Charter, among other things, it was declared that—

"The said Georgia Railroad Company shall at all times
"have the exclusive right of transportation or conveyance
"of persons, merchandise and produce over the railroad
"and railroads to be by them constructed while they see fit
"to exercise the exclusive right: Provided that the charge
"of transportation or conveyance shall not exceed fifty cents
"per hundred pounds and ten cents per cubic foot on
"articles of measurement for every 100 miles, and five cents
"per mile for every passenger: Provided, always, that the
"said Company may, when they see fit, rent or farm out all
"or any part of their exclusive right of transportation or
"conveyance of persons on the railroad or railroads, with
"the privilege to any individual or individuals or other
"Company, and for such terms as may be agreed upon,

"subject to the rates above mentioned. And the said "Company in the exercise of their right of carriage or "transportation of persons or property, or the persons so "taking from the Company the right of transportation or "conveyance, shall, so far as they act on the same, be "regarded as common carriers." (Page 174.)

The Court held:

First—That the rates named were intended as a limitation on the right to charge, so long as the Company was given the exclusive right to operate the road.

Second—That it was at least intended as a **limitation** on the right to charge, and not as a **grant** of power to charge up to the limit.

The Court, however, in that case used this significant language:

"It is conceded that a railroad corporation is a private "corporation, though its uses are public, and that a con- "tract embodied in terms in its provisions, or necessarily "implied by them, is within the constitutional clause pro- "hibiting legislation impairing the obligation of contracts. "If the Charter in this way provides that the charges which "the Company may make for its services in the transporta- "tion of persons and property, **shall be subject only "to its own control up to the limit designated, "exemption from legislative interference "within that limit will be maintained."** (Page 182.) (Our italics.)

The Court holds in accordance with all the authorities, that such a grant will be strictly construed, and must be given in unmistakable language that can not be **reasonably** construed consistently with the reservation of the powers of the State. We shall presently undertake to show

that our case meets fully the requirements laid down in this opinion for an enforcible contract.

In the case of Reagan vs. Farmers Loan and Trust Co., 154 U. S., 362, no provisions of the Charter prescribing rates are stated in the opinion or statement of facts, as being a part of the Charter contract.

The Court, however, after referring to the Dartmouth College Case as the beginning of the law on this subject, says:

> "The International and Great Northern Railroad "is a corporation created by the State of Texas. The "Charter which created it is a contract whose obligations "neither party can repudiate without the consent of the "other . . . **If the Charter had in terms "granted to the corporation the power to "charge and collect a definite sum per mile for "the transportation of persons or of property, it "would not be doubted that the express stipu- "lation formed a part of the obligation of the "State which it could not repudiate."** (Page 392.) (Our italics.)

In the case of the Covington Turnpike Co. vs. Sanford, 164 U. S., 586, the alleged contract was not upheld because it was held that the contract provision with reference to rates had not passed from the old company to the new company. We are not permitted to doubt, however, from the whole trend of decision and especially from the opinion of the learned Justice who delivered this opinion, viz., Justice Harlan, that if the question had been made by the old company, in other words, if the consideration of the case had not been complicated by the transfer of the privileges from one company to the other, the contract would unquestionably

have been upheld as a valid, subsisting, enforcible contract.

The case of Laurel Fork & Sandy Hill Railroad Co. vs. West Virginia Transportation Co., 25 W. Va., 324, stands practically alone in this country as holding that it was not within the power of the Legislature to grant a Charter to a railroad Company in which it might make, by any language that should be used, a contract prescribing definitely the rates which might be charged. The case proceeds upon the theory often denied by this Court, that the railroad company is not a private corporation but a quasi-public corporation, and comes within the rule so often laid down as to municipal corporations. The opinion is a very long one and the Judge has shown an almost inexhaustible fund of patience and research in finding a great many cases which have bitterly criticised the principles laid down in the Dartmouth College Case; but while it is true that these principles laid down in the Dartmouth College Case have been perhaps more vigorously assailed than the principles of any other case of this or any other Court, it is also true that in the main these principles, as Chief Justice Waite said in Stone vs. Mississippi, 101 U. S. 816, "have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself"; and this Court, in its opinion by Mr. Justice Brown in Pearsall vs. Great Northern R. R. Co., 161 U. S., 660, said:

> "The doctrine of this case has been subjected to more "or less criticism by the Courts and by the profession but "has been reaffirmed and applied so often as to have be- "come firmly established as a canon of American juris- "prudence."

It would therefore be quite remarkable if at this day this Court should give any weight to an opinion of a Judge of any

Court, who should practically refuse to follow the Dartmouth College Case.

In Regan vs. Aiken, 9 Lee (Tenn.), 610, the Charter provision simply fixed the maximum of charges, and this was not done in language of **grant,** but in plain language of **limitation,** exactly as was done in the case of Georgia Railroad Co. vs. Smith, 128 U. S. The language of the statute here, however, is not the language of **limitation** upon the power to charge. It is the language of **grant;** it is language granting absolute power to the Directors of the Company to charge **any sum up** to the maximum limit prescribed and clearly comes within the rule laid down in the Smith case, supra.

We do not question the proposition that grants of exclusive privileges must be strictly construed, but that does not mean that ingenuity shall be set in motion to devise any construction, however strained, which language may be tortured into meaning, without reference to the intention of the parties. It means only that such grants shall not pass by implication, or if two constructions, each of which is reasonable, lie open, that one must be adopted most unfavorable to the grantee and most favorable to the public.

In Morawetz on Private Corporations (Section 316), the author says:

> "There is no reason why a charter should be construed "differently from other written instruments. The object "should be to discover the intention of the parties, and it "would be absurd to attempt to ascertain the intention of "the parties by the application of any technical or arbi- "trary rule."

Again, in 23d American and English Encyclopedia of Law, page 374, under the title of "Strict Construction," it is said:

"Strict construction, as applied to statutes, means that "they are not to be so extended by implication beyond "the legitimate import of the words used in them as to "embrace cases or acts not clearly described by such "words, and to bring them within the prohibition or "penalty of such statutes. **It does not mean that "words shall be so restricted as not to have "their full meaning,** but that everything shall be "excluded from the operation of statutes so construed "which does not clearly come within the meaning of the "language used." (Our italics.)

Fair illustrations of this well-expressed explanation of the rule as to strict construction may be found in a number of cases often cited in support of the rule.

Thus in Providence Bank vs. Billings, 4 Peters, 514, the charter of a bank was silent on the subject of taxing the Bank, and the corporation claimed that it was thereby exempt from taxation. The Court applied the rule now relied on by appellee, and said such a privilege could not be presumed.

In Charles River Bridge vs. Warren Bridge, 11 Peters, 419, a bridge company by its charter was given the right to build a bridge across a river. It insisted the right was **exclusive,** but the charter did not say so, and the Court refused to extend the language used.

In Bailey vs. Maguire, 22 Wallace, 215, an amendment to a charter provided that the corporation should pay the same rate of taxes to the State as assessed by the State on other real and personal property. The corporation under this claimed exemption from all taxes except **State** taxes. No such exemption was given by the charter, and the Court refused to imply it.

In Stein vs. Bienville Water Co., 141 U. S., 67, the exclusive right had been given this water company to supply Mobile with water from Three-Mile Creek. The Company claimed under this the exclusive right to furnish the city with water from this creek, **or from any other source.** The Court applying the rule under consideration refused to so extend the words of the grant.

So in South Carolina vs. The Coosaw Mining Co. (144 U. S., 562), the Court said the rule was applicable to a case where an act "is **fairly** susceptible to either construction"; and that it meant that "nothing passes by mere implication."

On the other hand, consider the Binghampton Bridge case, 3d Wallace, 51. Here the Court admitted the rule, now contended for, in as strong terms as any case has done, but showed that it was not permitted thereby to reject or distort the plain meaning of plain language; and it upheld the contract there claimed. It would take too much space to set forth here the various provisions of the acts which together were claimed to constitute a contract giving the Chenango Bridge Co. the exclusive right to maintain a bridge over a river for the space of four miles, where it was shown that the population of the town at which it was built had grown from a little hamlet to a city of ten thousand people; that they were scattered along both sides of the river; that the depots and public buildings were situated on both sides of the river half a mile above the bridge, thus requiring people to go half a mile down the river and then half a mile up on the other side in order to go between such buildings; and that the bridge was utterly inadequate to the public needs.

It was necessary to establish a regular chain of title through four different charters, with varying provisions, to

make out the contract claimed; and counsel opposing it insisted it was "a contrivance to obtain a contract without the Legislature being aware that one was given," and referred in strong language to the "covert designs of the draftsman," etc. (page 67); and showed that while it was claimed that the exclusive right covered a space two miles above and two miles below the bridge, merely by reference to the charter of another bridge company over another river, yet in this case the river did not, in fact, extend more than one hundred rods below the bridge where it emptied into another river. Counsel therefore contended that this provision of the first Charter over the Delaware River could not have been intended to apply to the one over the Chenango River. The Court admitted the rule as to resolving doubts in favor of the public, etc., but still said:

> **"All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect: and no strained or artificial rule of construction is to be applied to any part of it."**

And again, while speaking of this case, we refer the Court to further language in the opinion on the subject of considering the times and circumstances under which the Charter was granted, in construing its provisions. The Court said:

"It is impossible to read this recital and escape the "conclusion that the Legislature thought the enterprise "did not promise present remuneration, and that large "powers and exclusive privileges must be given, to get the "stock taken and the bridges built. It is evident that "what was then considered a great scheme of internal im- "provement was in the mind of the Legislature. Such a "scheme was, at that early period in the history of the "State, not of easy solution. It required more energy and "foresight, and involved greater hazard, in the commence- "ment of this century, to build turnpike roads through an "unbroken wilderness and erect bridges over dangerous "streams, than it would now to checker the surface of a "State with railways. These considerations are great "helps in arriving at a correct knowledge of the intention "of the Legislature, and in giving a proper construction "to the grants that were made. **For it should never "be lost sight of that the main canon of the "interpretation of a contract is to ascertain "what the parties themselves meant and "understood."** (Our italics.)

Now the Legislature, not by **implication,** but in express terms, in the Charter of the appellee has said that "the President and Board of Directors shall have power to charge . . . **any sum** not exceeding the following rates, to-wit:" etc., naming the maximum of rates there specified.

And if it be true that "the main canon of the interpretation of a contract is to ascertain what the parties themselves meant," if it be true that "it is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold and give it effect," if it be true that "no strained or artificial

rule of construction is to be applied to any part of it," then it is true that appellee has the "power to charge . . . . . **any sum** not exceeding" the rates named in the Charter, simply because the Charter plainly says so. And if it be true, as alleged in the bill and admitted by the demurrer, that the rates now charged by appellee are **less than those named in the Charter,** then appellee has the power to charge these rates; and to take away that power is to violate a plain contract right.

In the Court below the counsel for appellee laid much emphasis on the words in the latter part of the clause under consideration as follows: "They shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort," which, if they stood alone, might be read as mere words of limitation and bring this case within the rule of the Georgia Railway Company vs. Smith, supra, but the Court will observe that these words are simply used in describing the limitation that follows the preceding general grant of power, viz., **"they shall have power to charge . . . any sum not exceeding the following rates, viz."** Under the "viz." in enumerating "the following rates", the language is used with reference to a certain kind of freight, that "they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort." In other words, there is an express grant of a specific power followed by words of limitation, and the words relied on by appellants are merely used in describing this limitation upon the preceding express grant. Or, to repeat the thought in slightly different form, there is a general **express grant,** as to **all kinds of freight,** of "the power to charge . . . **any sum** not exceeding" certain limitations. Then in describing these limitations the Charter, as to certain kinds of freight specifically states the

maximum charge, while as to other kinds of freight, instead of specifying the limitation in detail, it makes use of a limitation prescribed by a scale of charges fixed in another Charter by providing that, as to this character of freight, "they shall charge no greater rate than is authorized to be charged" in this last mentioned Charter. The rates specified in the Lexington & Frankfort Charter are simply made use of to describe or specify what is meant by "the following rates" where the Charter of appellee says, "they shall have power to charge **any sum . . . not exceeding the following rates, viz.**"

We submit that this language is not a mere **limitation** on the right to charge greater rates than those specified, but it is an express provision granting the right to charge **any sum** less than those rates fixed as the maximum, either in the Charter of the appellee, or in the Charter of the Lexington & Frankfort Railroad.

We are now brought to the last case upon which the counsel rely, and that is the case of Winchester, etc., Turnpike Co. vs. Croxton, 98 Ky., 739.

In this case the Kentucky Court of Appeals held, in avoidance of a plain contract, that the language did not constitute a permanent contract because the **duration of the period** during which the rates prescribed might be charged was not given. The language in that case of the Charter contract is as follows:

"SEC. 15. It shall be lawful for the President and "Managers to collect and receive of and from all and every "person or persons using said road the tolls and rates "hereinafter mentioned, and to stop any person riding, "leading or driving any horse, etc., until they shall have "paid toll agreeable to the following rates, to-wit: For

"every hundred head of hogs, sheep or small stock 6¼ "cents," etc.

After disposing of some unimportant question the Court proceeds to consider and discuss the main question as to whether the provisions of the Charter evidence an irrevocable contract between the State and the corporation. It cites a number of cases, the authority of which is of course admitted, to the effect that such grants shall be strictly construed, and then concludes that such a contract will not be held to be a durable one unless the time during which the right to charge the rates prescribed is definitely fixed, or unless it is expressly declared that the right to make these charges shall continue forever.

The Court cites a number of cases in which it says that the words of contract are used, and that the duration of the contract was particularly prescribed. Among others it cites Gordon vs. Appeal Tax Court, 3 How., 133, where it was declared that—

"Upon any of the banks of the State complying with "the provisions of the Act, the faith of the State is hereby "pledged not to impose any further tax or burden upon "them during the continuance of their charters under this "Act. The Court continues: 'Language equally strong "and explicit was used in the case of State Bank of Ohio "vs. Knoop, 16 How., 369; Bridge Proprietors vs. Hobo-"ken, 1 Wall., 116; and in Home of the Friendless vs. "Rouse, 8 Wall, 430.'

"In the first of the three cases mentioned, viz., the "Knoop case, the Charter contract is contained in the "60th section which provided that 'each bank coming "under the Act or accepting thereof, and complying with "its provisions, shall semi-annually, on the days designated

"for declaring dividends, set off to the State six per cent. "of the profits, deducting therefrom the expenses and "ascertained losses of the company for the six months "next preceding. Each semi-annual amount so set off "shall be in lieu of all taxes to which the company or "the stockholders therein should otherwise be subject, the "sum so set off to be paid to the Treasurer on the order "of the Auditor of the State.'"

It is perfectly obvious from this language that there was no duration prescribed to the contract in the Knoop case.

The Court, as was subsequently said in the Binghampton Bridge case, endeavored to arrive at the intention of the parties, and it seemed to the Court that the only reasonable conclusion to arrive at was that this contract of commutation of the taxes was, in the absence of any other language limiting it, co-extensive and should be deemed to be co-extensive in time with the Charter itself. This is emphasized by the fact that Mr. Justice Campbell in his dissenting opinion suggested that there was no time limit fixed for the duration of that feature of the contract which affected the commutation of taxes, but the majority of the Court rejected that idea and held that the contract was enforcible, and at a very much later date, an almost exactly similar provision was found in the charter of a Tennessee bank and came under the review of this Court in the case of Farrington vs. Tennessee, 95 U. S., 689, and was sustained as a contract. The language in that case was:

"That the said Company shall pay to the State an an- "nual tax of one half of one per cent. on each share of the "capital stock subscribed, which shall be in lieu of all "other taxes."

If the reasoning of the Court of Appeals of Kentucky had been sound this Court might well have said that because no time limit was fixed to this contract of commutation, it might have been repealed by the next succeeding Legislature; but it did not do so; it held in a strong opinion that the contract must be enforced; and while there were dissents from this opinion, these dissents did not touch this question, but proceeded upon an entirely different ground, viz., that the contract of exemption by the bank did not exempt the stock in the hands of the holders.

In the case of Franklin County Court vs. Bank of Kentucky, 87 Ky., 375, the Court had before it three Charters. In one it was expressly provided that the contract of commutation should be co-extensive with the Charter itself, but in the other two it did not so provide, and yet the Court of Appeals in Kentucky by its unanimous opinion upheld all the contracts as meaning the same thing.

In the case of Binghampton Bridge Company, 3 Wall., 51, the Charter life of the Company was perpetual, and yet the provision of the statute which was upheld as a contract did not declare that the right thereby granted should last forever. It simply provided that it shall not be lawful for any person or persons to erect any bridge or bridges within two miles either above or below the bridge to be erected and maintained in pursuance of this Act.

If this Court had cared to adopt the reasoning of the Kentucky Court it could quite easily have held that that contract dealt only with the existing condition of affairs and could not be held to prevent the erection of another bridge, after the little hamlet, which existed at the time of the grant, had grown into a city of ten thousand inhabitants, and another bridge was required to accommodate the wants of the public, but this Court felt itself bound under the plain language quoted, to uphold the claim of contract in perpetuity.

In the case of the Home of the Friendless vs. Rouse, 8 Wall., 430, the Charter provision relied upon as constituting the contract was:

"All property of said corporation shall be exempt "from taxation, and the 6th, 7th and 8th sections of the "1st article of the Act concerning corporations approved "March 19, 1845, shall not apply to this corporation."

The 7th section thus referred to provided that the Charter of every corporation that should thereafter be granted by the Legislature should be subject to alteration, suspension and repeal at the discretion of the Legislature.

The Court in its opinion upon considering this statute and upholding the legislative grant, said:

"It is true that legislative contracts are to be construed "most favorably to the State if on a fair consideration to "be given the Charter, any reasonable doubt arise as to "their proper interpretation; but, as every contract is to be "construed to accomplish the intention of the parties to it, "if there is no ambiguity about it, and this intention clearly "appears on reading the instrument, it is as much the duty "of the Court to uphold and sustain it as if it were a con- "tract between private persons. Testing the contract in "question by these rules, there does not seem to be any "rational doubt about its true meaning. 'All property of "said corporation shall be exempt from taxation,' are the "words used in the Act of incorporation, and there is no "need of supplying any words to ascertain the legislative "intention. **To add the word 'forever' after the "word 'taxation' could not make the meaning "any clearer."** (Our italics.)

The Court reached the conclusion there stated simply from the language of the grant of exemption from taxation

(which fixed no period of duration) and without reference to the subsequent language which suspended the operation of the general reservation law; and after it had reached that conclusion merely says that it is "fortified" by other language which had the effect of suspending the reservation Act.

Judge Curtis in his argument asserted that the effect of the language suspending the reservation Act was equivalent to an assurance that the legislative power should not thereafter be used to interfere with the franchise, but in speaking of this feature of the Act he asserted that it was "very unusual if not unprecedented." What greater effect then should be given to that Act, than should have been given, if it had been adopted prior to the adoption of a general reservation law?

It was at the time of the adoption of the Charter of the appellee a matter of general knowledge, constantly acted upon by the very Legislature that granted the Charter, that except as the right of alteration or repeal was expressly reserved in the Charter granted, it did not exist. The failure therefore to reserve such control was equivalent to an express declaration that the contract should never be altered by any future Legislature except with the consent of the corporation.

An examination of the Kentucky Acts of 1849–50 will disclose that in forty-three charters granted by that Legislature to private corporations the right to alter or amend was reserved in language substantially the same in every instance, the usual from of expression being: "The Legislature shall from time to time have power to alter, change or amend this Charter." (See Acts of 1849–50, pages 115, 123, 127, 138, 147, 150, 156, 179, 181, 207, 209, 211, 213, 224, 227, 230, 234, 277, 278, 287, 305, 335, 340, 341, 345, 372, 405, 486, 492, 496, 504, 516, 537, 553, 577, 582, 586, 607, 628, 648, 653, 678, 712.)

There were also passed that session a number of charters of private companies in which the right was not reserved An examination of these will show that they covered the incorporations of banks, insurance companies, churches, schools, turnpikes, bridges and railroad companies. There were during that session seven railroad companies incorporated, and it is significant that the right to alter or amend was not reserved in any of them, which shows that that Legislature believed that the true interest of the State would be subserved by making these irrepealable contracts with railroad companies for the material development of the State; nor will any one at this day question the wisdom of that policy upon the part of the Legislature when the agency which railroad companies have had in the development of every branch of industry in the State is remembered.

It was much more difficult at that day than at this to accomplish such enterprises. The wealth of the country had not become then, as it has later, centered in a few hands; there were not many citizens in this State very strong financially, and the hazard to capital thus invested seemed much greater then than now. It is not at all probable that any of the railroad companies would have accepted their Charters or undertaken the construction of their roads if the Legislature had retained the power of repeal or amendment. This conclusion is justified not only by the history of the time but by the failure of the Legislature to retain control over the Charter. Therefore we insist that when it is remembered that the Legislature knew that by refraining from reserving the right of alteration or amendment it was giving and intended to give an irrepealable contract during the chartered existence of the Company, the Charter in this case should be read and understood to have exactly the same effect as if in words it had been said that no future Legislature shall

alter or amend in any material respect the Charter hereby granted without the consent of the corporation.

In the case of the Bridge Proprietors vs. Hoboken, 1 Wall., 116, the Act is not quoted literally, but Mr. Justice Miller thus states the effect of it:

> "The Act also contained a provision that it should be "unlawful for any person or persons to build any other "bridge within limits which were defined on each side of "these bridges."

How long this prohibition was to last was, so far as we can see, not stated in the Act, but this Court held, over seventy years afterward, when, as said by Mr. Justice Miller, "a period of time equal to three generations of the human race had elapsed," that the contract was still a subsisting valid contract and the prohibition enforcible against the construction of **similar** bridges, but that **railroad** bridges were not within the contemplation of the parties and therefore not included in the prohibition. Thus it seems clear that the very authorities cited by the Kentucky Court fail to sustain it in the position taken by it.

With due respect for the opinion of the Kentucky Court of Appeals in the Winchester Turnpike case, supra, it seems to us the suggestion that the agreement as to tolls was entirely subject to the will of the Legislature because of the failure to state the duration of the period during which the contract tolls should apply, falls within that class of cases suggested above where ingenuity has been misused to avoid a plain contract, to which the faith of the State had been pledged.

There can not be any reasonable doubt that the Legislature thought it was giving, and that the Turnpike Company

thought it was receiving, an irrepealable contract right to charge such tolls as it was given the right to charge by its Charter. If the Charter had provided in so many words that the right to charge the prescribed tolls should never be taken away by any subsequent Legislature without the consent of the Company, it is conceded by the learned Court that there would be no way of avoiding the contract. And yet it can not be questioned that the Legislature which granted the Charter knew it had the right to retain control over the Charter contract, by expressly reserving it, and that its failure to do so was equivalent to an express statement that the contract should never without the consent of the Company be changed, and since it is agreed on all hands, that the intention of the parties should be effectuated, it surely can not make any difference how that intention is ascertained so that it be manifest.

We have examined a great many cases both in this Court and in the various States and many in Kentucky, in which contracts have been upheld, and while in a considerable number of them the time within which the contract relied upon was to operate, was expressly named, we feel quite confident we are right in saying that in the great majority of the cases where the contract was upheld, the time limit was not fixed, and in each of those cases this Court and the courts of the States could have easily avoided the contract if they had been inclined to adopt the reasoning of the Kentucky Court.

At the time the Charter of the Louisville & Nashville Railroad Company was granted the State of Kentucky was practically without means of transportation by rail, and it was the intention of the Legislature to grant to the Louisville & Nashville Railroad Company the right to fix its own rates within the limits prescribed. And it was on the faith of such Charter contract, then clearly recognized and acted

upon, that the Louisville & Nashville Railroad Company proceeded to expend millions of dollars in providing lines of transportation within Kentucky and to bring Kentucky into close touch with all the vast region of territory now traversed by the various lines of that Company.

We take the liberty of quoting liberally from the well considered case of P., W. & B. R. R. Co. vs. Bowers, 4 Houst. (Del.), 506. The Charter provided that the Company was authorized to demand and receive such sum or sums of money for tolls of persons or property as the Directors should from time to time think reasonable, provided that the toll on any species of property should not exceed eight cents per ton per mile, nor on passengers four cents per mile. A subsequent Act limited the right to charge to a point below that fixed in the Charter, and was assailed on the ground that it impaired the obligation of the contract. The Court sustained the contention and held the subsequent act void for the reason stated.

In its opinion the Court said:

"In the first place, then, since the decision of the cele-
"brated Dartmouth College Case, in 1819 (4 Wheat., S. C.
"Rep., 518), it has ceased to be a point for discussion that
"a corporate charter is a contract within the prohibitory
"clause referred to; and further, that a charter is none
"the less protected against legislative interference although
"the franchise granted be one in the exercise of which
"the public are interested, if, nevertheless, the corporation
"itself be a private one. For, the uses of a corporation
"may in a certain sense be public, and yet the corporation,
"with its franchises and property be private—as much so
"as if such franchises and property were vested in a single
"person instead of in a company; and nothing can be
"clearer than that franchises and property which in their

"nature are private must be equally inviolate whether "vested in a corporation or in an individual. To this "class of private corporations for public uses belong a "large number, such as colleges, banks, insurance, turnpike "companies, etc. A broadly marked distinction is taken "in the Dartmouth College Case between these quasi-"public corporations and those of a more limited class "which are strictly public corporations. The latter might "be more properly distinguished as civil or municipal cor-"porations. These are created by the Legislature solely "for purposes of local government, such as are incorpor-"ated cities, towns, or counties. They are depositories of "a portion of the political power of the State, which they "exercise not as a private franchise but as a public trust— "as the mere agents or trustees of the Legislature, subject "to its supervision and control. Such a charter is not in "any proper sense a contract **inter partes** within the "prohibitory clause of the Constitution. It is therefore "revocable, and is subject to alteration at the pleasure of "the Legislature, saving any private rights and interests "which may have previously become vested under the "action of the corporate body. But charters creating "what may be termed business corporations possess all the "ingredients of contracts. First, there are parties whose "concurrent action is essential to give them force and "effect, the Government proffering and the corporations "accepting the franchise, with such privileges and condi-"tions as the Legislature may see fit to attach to it. There "are also mutual obligations impliedly assumed by the "parties—the Government becoming bound, on the one "hand, for the secure enjoyment by the grantees of the "corporate franchise, according to the terms and condi-"tions of the charter, and the corporators on the other "hand, undertaking, in consideration of the privileges

"bestowed, to exercise them faithfully for the purposes "contemplated in the grant of them. Further, the busi- "ness conducted under such charters, quite as much as "like enterprises set on foot by persons unincorporated, is "provided for by private capital invested by the corpora- "tors for their individual profit, and the property held and "employed by the corporation belongs to the corporators."

Again the Court says:

"We may next proceed to inquire whether the Act of "the General Assembly under consideration impairs the "obligation of the contract contained in the Charter of the "Railroad Company. And to this question also the "Dartmouth College Case will be found to afford a clear "and conclusive answer.

"The sense of the phrase 'impairing the obligation of "a contract' and the precise effect of the constitutional "prohibition will vary somewhat according to the subject "matter to which it is applied. In the case of contracts "wholly executory, which were doubtless those directly "contemplated by the Constitution, the operation of the "clause would be to prohibit any law discharging or releas- "ing a party to the contract from the stipulations under- "taken to be performed on his part or modifying such "stipulations. It is thus that a State insolvent law which "undertakes to discharge a debt contracted prior to its "passage comes in conflict with the constitutional provis- "ion. Where the contract is an executed one, as is a "grant, the obligation of it is held to be impaired by a law "operating to divest any right of estate which has passed "or become vested under the grant. Such was the con- "struction of the phrase under consideration in the cele- "brated case of Fletcher vs. Peck, 6 Cranch, 87, in which

"an Act of a State Legislature, undertaking to re-assume "rights which had vested under a grant made by a prior "Legislature, was held to impair the obligation of the "contract implied in the grant. The Dartmouth College "Case was the first in which this phrase 'impairing the "obligation of a contract,' received a direct judicial con- "struction as applied to a corporate charter. Such a "charter would seem to be quite clearly within the "principle of Fletcher vs. Peck. For treating a charter "simply as a grant or executed contract, the franchise "which is the subject matter of the grant, must be as "clearly protected by the Constitution against any revoca- "tion or abridgement of it, as is a title to land which may "be the subject of a legislative grant. But a charter is a "contract both executed and executory; and viewing it in "the latter aspect, the Court in the Dartmouth College "Case held that in the grant of a charter there is an "implied contract on the part of the Government that the "corporators having accepted the franchise, shall, so long "as they exercise their corporate powers faithfully, in "accordance with the ends and purposes of their incorpora- "tion, enjoy the franchise as fully and beneficially as it is "granted, without abridgement or alteration. Hence the "Court deduced as the principle of its decision, that a law "altering the charter in any of its material provisions, "without the consent of the corporation, impaired the "obligation of the contract. Now, what will or will not "amount to such a material alteration of the charter as to "bring a law into conflict with the constitutional prohibi- "tion it may not be easy to define, but it is sufficient and "quite safe to say that an Act having the effect to abridge "or restrict any power or privilege vested by the charter "which is material to the beneficial exercise of the fran- "chise granted, and which must be supposed to have

"entered into the consideration which induced the corpo-
"rators to accept the charter and to assume the duties
"imposed by it, is such an alteration as the constitutional
"provision forbids, and that any Act so operating is
"invalid.

"Let us apply this principle to the case in hand. The
"object and effect of the law under consideration is to reg-
"ulate, and so far to restrict, the power of the railroad
"company to charge for the transportation of passengers
"and freight. Of such a power it is hardly enough to say
"that it is one of value and importance to the Company;
"it is one essential to the enjoyment of the franchise, and
"must be presumed to have been the consideration for
"which the corporators accepted the charter, invested their
"money, and assumed the obligations imposed upon them.
"It was undoubtedly competent for the Legislature, by a
"provision in the Charter, to reserve to itself the right to
"supervise and regulate in the future this power of the
"Company; but upon a careful examination of the orig-
"inal Acts, incorporating the several companies now com-
"posing the Philadelphia, Wilmington & Baltimore Rail-
"road Company, we are unable to find in them any
"reservation of such legislative control over these com-
"panies as is necessary to sustain the Act under considera-
"tion. The power to adjust its tariff of charges by its own
"officers, according to their views of the necessities of
"business and of justice to the public, without supervision,
"was a part of the franchise as it was granted. The
"attempted regulation by the Legislature of this power
"materially abridges the beneficial exercise of it by the
"corporation, and without any doubt impairs the obliga-
"tion of the contract in the sense of the Constitution as
"interpreted by the Dartmouth College Case."

In that case it will be seen that the Company had the right to charge any sum the Directors might determine on, not to exceed the maximum stated in the Charter. In that respect that case is more nearly analagous to the case at bar than any we have been able to find (except the one next referred to), and we submit that the conclusion reached by the Delaware court was necessary to give effect to the statute; and that a similar conclusion is equally necessary to effectuate the intention of the Legislature in its grant to the appellee.

The latest and most comprehensive and carefully prepared review of all the authorities upon the question under discussion, as well as one of the ablest opinions we have read upon the subject, will be found in the case of Pingree vs. Michigan Central Railroad Company, decided in 1898, and reported in 76 N. W. Rep., 635. The statute which was relied upon and which was upheld as a contract was in the following language:

"SECTION 15. That it shall be lawful for respondent "from time to time to fix, regulate and receive the tolls, "and charges taken for the transportation of property and "persons on said railroad, subject only to a limitation as "to passengers of three cents a mile and ten cents in addition on distances not exceeding thirty miles."

It was insisted by the State:

First—That there was not power in the Legislature to make such a contract, so that it could not be altered or changed by subsequent Legislatures.

Second—That if there was such power, the language employed was not sufficient to constitute an irrepealable contract.

Other questions were raised and considered not involved in this case. The Court held in a very carefully prepared

opinion, depending very largely upon the decisions of this Court for its authority, (1) that the State did have the right to make such a contract; (2) that the language employed could not be reasonably construed otherwise than as intended to constitute a contract between the parties, and as such, must be upheld. In reaching this conclusion, all of the decisions of this Court and other courts which have dealt with the question are considered, and upon a review of all the cases decided by this Court, which have directly or indirectly borne upon the question, as well as other cases, the Michigan court reached the conclusion that the words quoted were sufficient to constitute, and did constitute, a valid, irrepealable contract. We will not quote from this opinion, but ask the Court's special attention to the case. The difficulty about quoting from this case is that it is so entirely devoted to a careful review of the authorities and discussion of the precise question involved, that we could hardly stop short of quoting the whole of that part of the opinion devoted to the questions above stated, and this would unduly prolong our brief.

It is, however, asserted by the Commonwealth, though not argued, that the acceptance of various amendments by the appellee, since the adoption of the reservation Act of 1856 (Appendix to Commonwealth's brief, page 150) operated as a waiver by the appellee of its contract rights. It is not pretended that such an inference can legitimately or reasonably be drawn from the language of any of the amendments, nor is any suggestion offered that such was the purpose of either the State or the appellee, but as we understand it, the contention is that the acceptance of any kind of an amendment without reference to the purport or intention of the Act would operate as a waiver of the contract right.

It would seem as an original proposition that there is little or no merit in the point, but we submit the question is

now concluded by the opinion of this Court in the case of Turnpike Co. vs. Sandford, 164 U. S., 578, which refused to give such an effect to an amendment affecting the very subject-matter of the contract.

It is next suggested that the contract as to rates applies only to the road between Louisville and the State Line in the direction of Nashville, Tennessee, but we submit that there is little merit in this suggestion: First, because it was of course expected that the general rights and franchises granted by the original Charter, such as fixing and taking tolls, condemnation, etc., should apply to all the lines which might be owned and operated by the appellee. (See Atlanta & Gulf R. R. Co. vs. Allen, 15 Fla., 662; Humphrey vs. Peaques, 16 Wall., 247.) Second, because by the very language of the amendment of 1851 to be found in the original brief, as well as in the appendix, the appellee was given as to branches constructed by it the same rights and privileges, subject to the same duties and restrictions as are given and imposed by the original Charter, leaving absolutely no doubt upon the proposition that the Legislature intended by these well-chosen words to give to the appellee exactly what the language imports, viz., all the rights and privileges, subject to the same limitations and restrictions over the branch lines, which were expected to become a part of the system as much so as the original road, as was given in the original Charter over the main line. Of course it goes without saying that when these branches are constructed there is no distinction in operating the road between the main line and the branches. They are all operated as one, and the Legislature knew that, and intended that the same rights and privileges should cover all.

It is true that while perhaps the principal branches were constructed by the L. & N. R. Co., yet some of the branches

were purchased by the L. & N., but we submit that it has been adjudged by this Court in the case of Branch vs. Jessop, 106 ~~100~~ U. S., 468, that under a right to construct a branch, the Company would not be bound to construct in order to secure the road authorized by the Charter to be constructed, if the road was at hand already built, but instead of constructing in such a case which would parallel an existing road, and make the acquisition of the road undesirable, the Company would have the right to buy the road. This is what the Court held in the Jessop case, in an opinion delivered by Mr. Justice Bradley, and we submit that the reasoning of the Court is unanswerable. The case has never been doubted since, so far as we know, and we submit that the decision is conclusive of the question. The second syllabus of the decision is as follows:

"A railroad company having the right of constructing "and operating lines of railroad, with general power to "purchase all kinds of property of whatever nature or "kind, may purchase from any other company a road con- "structed on that line if the latter company had power to "sell and dispose of the same."

An examination of the Charter in that case will show that the general grant of the power to purchase all kinds of property was no broader, and indeed could not be any broader than the language of the Charter of the appellee (which authorized the purchase of all kinds of property, real, personal and mixed.) In each instance the language was probably intended only to allow the purchase of all kinds of property touching the operation of the road authorized, but the Court held that under such language there was a right to purchase any road, which the company had the right to construct. (Page 484.)

We submit that this decision is in accordance with the plainest principles of good sense and reasoning, and that the power to construct carries with it the power to buy, if the desired road be found already constructed.

While we think this right to construct is broad enough, yet by the Act of January 17, 1856 (Appendix to Commonwealth's brief, pages 152–3), express power was given to purchase and hold any road constructed by another company. The Company has always until recently supposed that this amendment was intended to authorize the purchase of independent roads, but this Court held in the case of L. & N. vs. Commonweath, 161 U. S., 667, that it applied only to purchasing branch roads. This Act as the counsel for the Commonwealth properly conceded, was approved and became effective January 17, 1856. What we have said heretofore on the subject of the principal line and branch roads being operated as one road, under the rights, privileges and franchises of the original Charter, applies equally to any road that might have been purchased under this amendment. In none of these amendments will it be found that the Legislature ever supposed that it was necessary to give any additional rights and privileges usually enjoyed by railroads, but they have acted consistently upon the principle that whatever might be done in the way of operating railroads bought or constructed under the amendments would be done under the original Charter.

III.

CONSTRUCTION OF STATUTES.

But if we are wrong in our contention that we have here an irrepealable contract which must be upheld, still it is, we submit, entirely plain that the provisions of appellee's Charter, prescribing the rates of toll for appellee, have never been changed. The doctrine that implied repeals are not favored is certainly a principle of law perhaps as generally understood by lawyers and lawmakers as any other principle embodied in the jurisprudence of the country. We could probably refer the Court to a case from every court in this Union whose opinions are published, holding to that proposition, but it seems quite a waste of time to collect authorities on that subject from other courts in view of this Court's opinions on the question. The authorities will be found reviewed in the case of Cope vs. Cope, 137 U. S., 682, where the principle is laid down that no statute will be construed as repealing a prior statute unless so clearly repugnant thereto as to admit of no other reasonable construction; and in the case of Ward vs. Race Horse, 163 U. S., 511, this Court recognized that the settled rule of construction undoubtedly is that repeals by implication are not favored and will not be held to exist if there be any other reasonable construction. If the Act now under consideration should be held to be a repeal of the Charter provisions of the appellee, it could only be done by going to such a length in favor of implied repeals as to completely upset and overthrow the settled doctrine of the country on that question.

The Charter and Act in question are not inconsistent and may stand together. The McChord Law will have ample material to act upon if it be applied only to those companies

whose rates are not prescribed by statute. Furthermore, it could be made to apply to the appellee if the appellee could be shown to be charging rates exceeding those prescribed in its Charter, but in view of the fact that it stands admitted by the demurrer that all of the rates now being charged by the appellee are less than those prescribed by the Charter, we submit that the judgment of the Circuit Court can easily be affirmed upon this ground alone.

An examination of the McChord Law in connection with the case of the Louisville & Nashville Railroad Company vs. the Commonwealth, 99 Ky., 132, makes it, it seems to us, too plain to admit of dispute that the McChord Law was not intended as a repeal of the Charter provisions of the contract of the appellee, nor indeed was intended to apply to the Louisville & Nashville Railroad Company. It will be noticed by reference to the McChord Law that it does not permit the Railroad Commission to fix any rates for any railroad company **until the Railroad Commission has found the company guilty of extortion.** The Court in the case of the Louisville & Nashville Railroad Company vs. Commonwealth, supra, clearly holds that the Louisville & Nashville Railroad Company **can not be guilty of extortion until its Charter rates are exceeded.** The bill alleges, and the allegation is admitted by the demurrer, that all the rates being charged by the appellee are **less than those permitted by the Charter. Therefore it follows that the Railroad Commission can not legally find the Louisville & Nashville Railroad Company guilty of extortion,** and therefore it necessarily follows that as to the Louisville & Nashville Railroad Company the Railroad Commission **can not legally fix or reduce its rates.** Hence, we say that

the conclusion is irresistible that the McChord Law was not intended at all to apply to the Louisville & Nashville Railroad Company.

In conclusion we suggest that in view of the opinions of this Court so often expressed, it was proper under the circumstances and on the allegations of the bill, to take jurisdiction to prevent the manifold oppressions and numerous suits and prosecutions which would have resulted if the Railroad Commission had been allowed to proceed in the enforcement, as against appellee, of the McChord Law.

We respectfully ask that the judgment be affirmed.

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Charles River Bridge vs. Warren Bridge, 11 Peters, 419.
Bailey vs. Maguire, 22 Wall., 215.
Stone vs. Bienville Water Co., 141 U. S., 67.
South Carolina vs. Coosaw Mining Co., 144 U. S., 562.
Binghampton Bridge Case, 3 Wall., 51.
State Bank of Ohio vs. Knoop, 16 How., 659.
Bridge Proprietors vs. Hoboken, 1 Wall., 116.
Home of Friendless vs. Rouse, 8 Wall., 430.
Bank vs. Tennessee, 95 U. S., 689.
P., W. & B. R. Co. vs. Bowers, 4 Houst. (Del.), 506.
Pingree vs. Michigan Central R. Co., 76 N. W. R., 635.
Cope vs. Cope, 137 U. S., 682.
Ward vs. Race Horse, 163 U. S., 511.

APPENDIX.

"McChord Law."

An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may

charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record book of their office and signed by the Commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent, or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars.

SEC. 2. The Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employe shall have jurisdiction in all prosecutions against said officer, agent or employe.

SEC. 3. Prosecutions under this Act shall be by indictment.

SEC. 4. All prosecutions under this Act shall be commenced within two years after the offense shall have been committed.

SEC. 5. In making said investigation, said Commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the Chairman of the Commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment.

Approved March 10, 1900.

EXTRACTS FROM CHARTER OF LOUISVILLE & NASHVILLE RAILROAD COMPANY AND SECTIONS OF THE CHARTER OF THE LEXINGTON & FRANKFORT RAILROAD COMPANY MADE BY REFERENCE PART OF THE CHARTER OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

EXTRACT FROM SECTION 18, L. & N. CHARTER.

SEC. 18. That the President and Directors shall have power to purchase, with the funds of said Company, and place on any railroads constructed by them under this Act, all machines, wagons, vehicles or carriages of any kind, which they may deem proper, for the purposes of transportation on said road; and that they **shall have power** to charge for tolls, and the transportation of persons, merchandise and property of any kind whatever, transported along said railway, **any sum** not exceeding the following rates, to-wit: On all goods, merchandise or property, for every one hundred pounds transported over twenty miles and under fifty miles, three and a half mills for each mile; and for persons, and every species of live stock and every description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort.

Approved March 5, 1850.

Extract From Section 20, Charter of Lexington & Frankfort Railroad Company.

Sec. 20. Be it further enacted, That the said Board of Directors shall have power to purchase, with the funds of said Company, and place on any railroad constructed by them under this Act, all machines, wagons, vehicles or carriages, of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and they **shall have power** to charge for tolls, and the transportation of persons, goods, produce, merchandise, and property of any kind whatsoever transported by them along said railway between Lexington and the Kentucky River, **any sum** not exceeding the following rates, to-wit: For transporting any distance single packages weighing less than one hundred pounds, twenty-five cents; and at that rate, if such packages weigh more than one hundred pounds; for transporting goods, produce, merchandise or property of any kind, not less than three and a half mills, nor more than four mills per hundred pounds weight per mile; for transporting passengers, not less than three and a half cents per mile, nor more than four cents per mile for each passenger, with his baggage not weighing more than forty pounds; except upon the article of coal, upon which there shall be charged not less than three cents on the bushel; but the charge on coal shall at no time be fixed at a rate which will not yield a profit on its transportation.

Live stock, poultry and furniture; also feathers, wool, rags, and other light, bulky articles, weighing not more than sixty-five pounds to the cubic foot; also silver and gold, bullion, money of all descriptions, and mails are excepted from the rates herein established; and the Board of Directors, or their agents, shall be and they are hereby authorized to contract specially for their transportation, upon such terms as

the parties interested may agree upon: Provided such rates shall in no case exceed fifteen per cent. over the rates allowed to be charged for heavy merchandise or produce, except for gold, silver, bullion, money of all kinds and mails. The said Board of Directors, and their agents, may charge for receiving, forwarding and storing such articles and packages as may be consigned to them, or deposited in their warehouses, or with their agents, for safe keeping, or to be forwarded; and they may establish by their by-laws, rates of storage and other fees for such services. But they shall make no rule or regulation, giving any preference in transportation of goods or other articles sent from other houses, stores or places; nor shall they make any difference in the rates of charges on goods or other property consigned to other persons for transportation on said road; but shall, in all things, receive and receipt for goods and property of every kind consigned to other persons on the same terms as if consigned to themselves.

Approved February 28, 1848.

AMENDMENT APPROVED FEBRUARY 26, 1849, TO CHARTER OF LEXINGTON & FRANKFORT RAILROAD COMPANY.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky: That the minimum rates for the transportation of persons, goods, produce, merchandise and property of every kind, established by the twentieth section of the "Act to Incorporate the Lexington & Frankfort Railroad Company," except that upon the article of coal, be, and the same are, hereby abolished, and the Board of Directors of said Company **shall have power** to charge for tolls, and the transportation of persons, goods, produce, merchandise and property of every kind (except coal), **any sum** they may deem proper, not exceeding the maximum rates prescribed by said twentieth section.

Amendment of Louisville & Nashville Railroad Company's Charter, Approved March 2, 1851.

Sec. 2. That said Company shall have power and authority to construct their road from the city of Louisville to any point or place in the direction of Nashville, Tennessee, and to connect the same with any railroad extending to Nashville, on such terms and conditions as the two companies may, from time to time, agree on, for the through transportation and travel of freight and passengers; and said Company shall have the same power and authority to construct a branch of said road to the Mississippi River, and any other branch said Company may desire, that the Charter gives them to construct the main line, and with the same rights and privileges, and with the same duties and restrictions, and may, for the main line and branches, acquire, as provided in the Charter and by this amendment, the right of way one hundred and fifty feet wide, or more, if necessary; and the quantity of acres of land which they are authorized by the Charter to acquire and hold, shall be exclusive of the right of way of the road and branches.

Extracts from Charters Construed in Cases Cited.

C., B. & Q. R. Co. vs. Iowa, 94 U. S., 155.

"The Burlington & Missouri River Railroad Company, "the benefit of whose Charter the Chicago, Burlington & "Quincy Railroad Company now claims, was organized "under the general corporation law of Iowa, with power "to contract in reference to its business, the same as pri- "vate individuals, and to establish by-laws and make all

"rules and regulations deemed expedient in relation to its "affairs, but being subject, nevertheless, at all times to "such rules and regulations as the General Assembly of "Iowa might from time to time enact and provide. This "is, in substance, its Charter."

The language of the Charter in this case is not quoted, but the foregoing is a quotation from the Court's opinion giving the substance of the Charter. (Page 161.)

Ruggles vs. Illinois, 108 U. S., 526.

On the 19th of June, 1852, an Act was passed—

"To amend an Act entitled 'An Act to incorporate the "Central Military Tract Railroad Company.' Section 6 "of said Act is as follows: 'The said Company shall have "power to make, ordain and establish all such by-laws, "rules and regulations as may be deemed expedient and "necessary to fulfill the purposes and carry into effect the "provisions of this Act, and have the well-ordering, regu- "lating, and securing of the affairs, business and interest "of the Company: **Provided,** that the same be not re- "pugnant to the Constitution and laws of the United "States or of this State, or repugnant to this Act. The "Board of Directors shall have power to establish such "rates of toll for the conveyance of persons or property "upon the same as they shall from time to time by their "by-laws determine, and to levy and collect same for the "use of said Company. The transportation of persons "and property, the width of track, and all other matters "and things respecting the use of said road shall be in "conformity to said rules and regulations, as the said "Board of Directors shall from time to time determine.'"

Railroad Commission Cases, 116 U. S., 307.

On the 3d day of February, 1848, the Legislature of Alabama passed an Act to incorporate the Mobile & Ohio Railroad Company. Section 12 of that Act is as follows:

"SEC. 12. And be it further enacted, that it shall be "lawful for the Company hereby incorporated from time to "time to fix, regulate, and receive the toll and charges by "them to be received for transportation of persons or "property on their railroad or way aforesaid hereby author-"ized to be constructed, erected, built, or upon any part "thereof."

Stone vs. Yazoo, etc., R. Co., 62 Miss., 606.

"The sixth section of the Charter of the appellee con-"fers on the Company the power to fix from time to time "by its Board of Directors the rates at which it will "transport persons or property over its railroads, provided "they shall not exceed the maximum specified in the "Act." (Quotation from Court's opinion, page 641.)

Georgia Railroad & Banking Co. vs. Smith, 128 U. S., 174.

An Act to incorporate the Georgia Railroad, passed December 21, 1833.

By an Act of December, 1833, its corporate name was changed to Georgia Railroad & Banking Co.

The 12th section of the Charter among other things declared that

"The said Georgia Railroad Company shall, at all "times, have the exclusive right of transportation or con- "veyance of persons, merchandise, and produce over the "railroad and railroads to be by them constructed, while "they see fit to exercise the exclusive right; **Provided,** "that the charge of transportation or conveyance shall not "exceed fifty cents per hundred pounds, and ten cents per "cubic foot on articles of measurement, for every hundred "miles; and five cents per mile for every passenger: **Pro- "vided, always,** that the said Company may, when "they see fit, rent or farm out all or any part of their "exclusive right of transportation or conveyance of per- "sons on the railroad or railroads with the privilege to any "individual or individuals or other company, and for such "terms as may be agreed upon, subject to the rates above "mentioned. And the said Company, in the exercise of "their right of carriage or transportation of persons or "property, or the persons so taking from the Company the "right of transportation or conveyance, shall, so far as they "act upon the same, be regarded as common carriers."

P., W. & B. R. Co. vs. Bowers, 4 Houst. (Del.), 506.

The Company was authorized to charge such sum or sums of money for tolls of persons or property as the Directors should from time to time think reasonable, provided that the toll on any species of property should not exceed eight cents per ton per mile, nor on passengers four cents per mile.

Pingree vs. Michigan Central Railroad Co., 76 N. W. Rep., 635.

Section 15 provided:

"That it shall be lawful for respondent from time to "time to fix, regulate and receive the tolls and charges "taken for the transportation of property and persons on "said railroad subject only to a limitation as to passengers "of three cents a mile and ten cents in addition on dis- "tances not exceeding thirty miles."

141 to 145
Nos. 396 to 400

Office Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk

Brf. of Humphrey, Hines, Helm, Colston, Wadsworth & Cochran

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Nos. 396, 397, 398, 399, AND 400.

For Appellees.

Filed Jan. 7, 1901.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLEE.

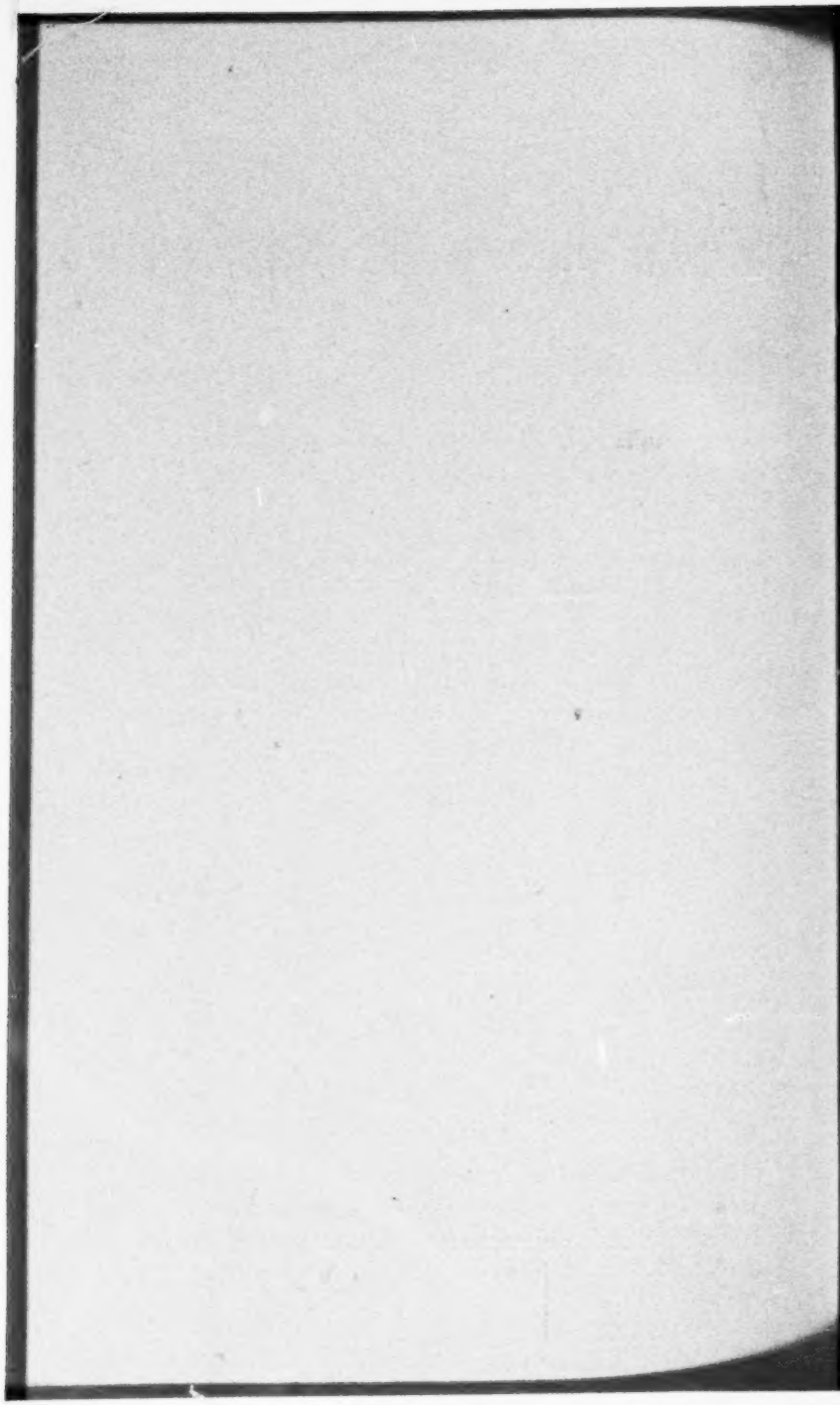
AND FOUR SIMILAR CASES.

BRIEF FOR APPELLEES.

A. P. HUMPHREY,
WALKER D. HINES,
For Appellees.

JAMES P. HELM,
EDWARD COLSTON,
W. H. WADSWORTH,
A. M. J. COCHRAN,
Of Counsel.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.



SUPREME COURT OF THE UNITED STATES

CHARLES C. McCHORD ET AL., - - - - - - - *Appellants,*

VERSUS

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee.*

SAME, - - - - - - - - - - - - - - - - *Appellants,*

VERSUS

CHESAPEAKE & OHIO RAILWAY COMPANY, - - *Appellee.*

SAME, - - - - - - - - - - - - - - - - *Appellants,*

VERSUS

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, - - - - - - - - - - - *Appellee.*

SAME, - - - - - - - - - - - - - - - - *Appellants,*

VERSUS

SOUTHERN RAILWAY COMPANY, - - - - - - - *Appellee.*

SAME, - - - - - - - - - - - - - - - - *Appellants,*

VERSUS

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY, - - - - - - - - - - - - *Appellee.*

BRIEF FOR APPELLEES.

On March 12, 1900, the General Assembly of the Commonwealth of Kentucky passed the act which is the subject of this litigation, and which is commonly known and will be hereinafter referred to as the McChord act. This act is as follows:

"An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employes from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violations of its provisions.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employe thereof charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employe shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense in any sum not less

than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars.

"Sec. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employe, shall have jurisdiction in all prosecutions against said officer, agent or employe.

"Sec. 3. Prosecutions under this act shall be by indictment.

"Sec. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"Sec. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

Appellees filed their bills in the Circuit Court of the United States for the District of Kentucky against Charles C. McChord, James F. Dempsey, and John C. Wood, seeking to restrain and enjoin them from taking any action whatever under said act against the respective complainants in the bills. Complainants contended that the McChord act would necessarily operate to deprive them of their property without due process of law, and deny to them the equal protection of the law, and was therefore in conflict with the Fourteenth Amendment of the Constitution of the United States. They further contended that the McChord act, by its terms, applied to interstate commerce, and was, therefore, in conflict with Clause 3 of Section 8 of Article 1 of the Constitution of the United States.

The Louisville & Nashville Railroad Company also con-

tended that the McChord act, if enforced, would necessarily impair the obligation of that company's contract with the Commonwealth of Kentucky evidenced by the charter granted to it by the Commonwealth of Kentucky to charge and authorizing it to charge not exceeding the rates specified and referred to in the charter. This contract right of the Louisville & Nashville Railroad Company will be discussed in a separate brief.

The circuit court, while holding that the McChord act was not in conflict with the commerce clause of the Federal Constitution, held that it necessarily operated to deprive the railroad companies of their property without due process of law, and to deny them the equal protection of the laws, and was therefore void. And, in view of the great multiplicity of suits and prosecutions which would otherwise ensue, and of the severely punitive consequences of the act, both to the railroad companies and to their employes, granted an interlocutory injunction upon the motion of complainants. The defendants demurred to the bills, and their demurrers were overruled, and the defendants declining to answer but standing by their demurrers, final decrees were rendered perpetuating the injunctions, and from these decrees these appeals are prosecuted.

It will be observed that the McChord act consists of two, and only two, branches. The first declares the contingency in which the railroad commission may take from the railroad company and assume for itself the rate-making power. The second provides a single method of enforcing the rates made by the commission in those cases where it has taken the rate-making power from the railroad company, that method of enforcement being by criminal prosecutions to impose heavy fines both upon the railroad company and its employes, varying from five hundred to five thousand dollars. Both branches of the act are necessarily in conflict with the Fourteenth Amendment of the Constitution of the United States, and on account of the interdependence of the two branches the unconstitutionality of either is fatal to the whole act.

ARGUMENT.

I.

THE PLAN PROVIDED BY THE McCHORD ACT FOR TRANSFERRING FROM THE RAILROAD COMPANIES TO THE RAILROAD COMMISSION THE RATE-MAKING POWER, DEPRIVES THE COMPANIES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES THEM THE EQUAL PROTECTION OF THE LAW.

1. The State of Kentucky has not attempted either through its legislature or its railroad commission to make the rates for all the railroads in the State, as has been done in most States which attempt to regulate directly the rates charged by railroad companies. On the contrary, the State has chosen to leave the railroad companies to fix their own rates, subject only to the common law requirement that those rates shall be just and reasonable. This general system has not been changed by the McChord act. That act has not authorized or directed the railroad commission to take up as an original, independent proposition the admittedly legislative duty of making rates generally for the railroads. The railroads of the State are to continue to make their own rates, subject to the common-law requirement of reasonableness, without any interference, with the single exception that, if a railroad company be accused of having charged an extortionate rate, and if the railroad commission upon investigation of that charge find the company guilty of extortion, then for that particular sort of transportation service that railroad company forfeits absolutely and finally the right to make rates at all, and the commission thereupon acquires the right to fix a rate to be thereafter charged, and may subsequently modify that rate without any notice to or hearing of the railroad company.

The McChord act does not define the extortion which is to forfeit the railroad company's right to make its rates. The only common-law offense of extortion seems to be

> "The unlawful taking by any officer, by color of his office, of any money, or thing of value, that is not due to him, or more than is due, or before it is due." (1 Bouvier's Law Dictionary, 567.)

We must therefore look to other statutes for a definition of the word extortion as used in this connection in the McChord act, and such definition is supplied by Section 816, Ky. Stats., which reads as follows:

> "If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion."

Therefore, before a railroad company is to be deprived of its right to make any rate it must be convicted of having charged or received more than a just and reasonable rate with respect to the particular character of transportation service involved, as prescribed in the section just quoted, and such finding of guilt is, under the McChord act, to be determined conclusively and finally by the railroad commission.

In Louisville & Nashville Railroad Company v. Commonwealth, 99 Ky. 132 (the opinion in which is printed in Appendix II), the railroad company was indicted for extortion under the section just quoted, and the Court of Appeals held that the section could not be enforced as a penal statute because it did not fix any standard by which the carrier might regulate its conduct, and that to impose penalties upon a carrier under such a vague and uncertain statute would be to deprive the carrier of its property without due process of law, and in violation of both the State and Federal Constitutions. Thus, by this decision it was established that *a court*

could not find the railroad company guilty of extortion and thereby take from it any of its property on that account. Yet without any further definition of extortion the McCord act authorizes *the railroad commission* to find the company guilty of extortion and thereby take from it the right to make any rate for the future for the particular sort of transportation service involved.

In short, instead of conferring upon the commission the general right and duty to make reasonable rates for the railroads in the State, the legislature has left that right to the railroad companies, and authorized the commission to hear and determine accusations of extortion, and has imposed as a penalty upon guilty railroad companies the loss of their right to fix the particular rates involved.

The lower court in its opinion herein thus characterized the system prescribed by the McChord act:

> "It will be observed that there is no general power delegated to the commission to fix rates, nor does the statute creating the commission give it any such right. Its sole authority in the premises is stated in the act above set forth, and must be based upon its conviction of the railroad extortion. It can not move until what we may call this jurisdictional fact has been ascertained to exist, and then, having proceeded to determine that the railroad has been 'guilty of extortion,' although it has been furnished with no unmistakable statutory standard as to what is to be held to be extortion, it lowers the rate of that road for that particular service. Its own opinion, its own judgment, is the sole guide upon both questions. (Transcript, p. 21.)

The court pointed out that it is frankly and properly conceded that the railroad commission is not constitutionally a judicial body, and can not, under the Constitution or laws of Kentucky, rightly exercise judicial functions, and then said:

> "Our analysis of the act in question, however, has clearly shown that the whole apparent purpose of the act was to give the commission the judicial power or at least

the quasi-judicial power to 'hear and determine' whether a railroad has been 'guilty of extortion,' and as a result to lower the freight rate of that railroad for similar services." (Transcript, p. 22.)

Upon this aspect of the case the lower court stated its view of the law as follows:

"The investigation of a complaint and the decision thereon by the commission that the railroad complained of is 'guilty of extortion' being the only way to put the act in motion, the railroad is entitled to first have a judicial determination of the question of its guilt before the rate can be lowered as a penalty for the act charged to have been committed. The commission can not judicially nor by due process of law determine the one question upon which its right to fix a lower rate must depend. This is emphasized by the absence of any precise statutory standard by which the commission is to be guided as to what is an extortionate charge. The railroads have the inherent right to charge and collect a just and reasonable rate. Nothing short of a judicial proceeding conforming to due process of law, which not only includes due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion as a basis for imposing the arbitrary penalty of lowering their customary rates and as furnishing a stepping-stone to ulterior penalties of great severity which it is the obvious purpose of the act to have inflicted. The legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an offense and lower its rates alone as the penalty of such conviction." (Transcript, pp. 23, 24.)

2. Although the State may have the power to take away entirely from railroad companies the right to fix their rates, yet obviously so long as it does not do so that right is one of great practical value and convenience to railroad companies. When the statute provides that this right shall be taken from a railroad company only when it is charged with extortion, and only to the extent that that charge is sustained, it is clear that every railroad company in the State continues to have a valuable interest in its

right to fix rates; indeed, this right is recognized by the McChord act itself, which in effect provides that it shall not be forfeited except where the railroad company has been guilty of extortion.

Counsel for appellants say the only penalty the railroad commission can inflict by a judgment convicting the railroad company of extortion is the fixing of a reasonable rate, and of this the railroad company has no legal right to complain. But the result is more far-reaching; it involves the complete destruction of the company's prior right to fix its own rate, subject to the requirement that it shall be just and reasonable, and transfers that right for all time to come to the railroad commission. The railroad company has a legal right to complain of this transfer under a statute which authorizes it only where the railroad company has been guilty of extortion when the determination of that question is not made in a constitutional manner.

This right has an intrinsic value to each railroad company considered by itself, and it has a distinct additional value of a comparative sort, for each railroad is vitally interested in having its right to make rates as untrammeled and unrestricted as the right of other railroad companies with which it has to compete.

So long, therefore, as the legislature chooses to predicate the withdrawal from the railroad company of its right to make rates solely upon a conviction of that company of extortion, the company has vitally important rights at stake when any such charge of extortion is brought against it, and it is entitled to have the determination of the charge surrounded with just the same constitutional safeguards as would be afforded if the result of the determination were the forfeiture of money instead of the forfeiture of a highly valuable right in the management of its business.

The McChord act fails to afford such constitutional safeguards because (1) it fails to prescribe a standard as to what shall constitute extortion in order that the railroad company may comply with the law and thereby retain the right to make its rates, and (2) it entrusts the determination of the essentially

judicial question involved, *i. e.*, whether the company has charged more than a just and reasonable rate, to the final and conclusive determination of a tribunal which is not a court, can not exercise judicial powers, and which in the nature of things is incapable of affording the judicial investigation and protection to which the railroad company is entitled. In both of these respects the McChord act operates to deprive the railroad company of its property without due process of law, and to deny to it the equal protection of the law.

3. For the Railroad Commission to take from the railroad company and assume for itself the power to make a rate, it must find the railroad company guilty of extortion, which, as above pointed out, is defined by Section 816, Ky. Stats. In L. & N. R. R. Co. v. Commonwealth, 99 Ky. 132, to which reference has already been made, it was clearly established in a forcible opinion that to inflict pecuniary penalties upon the railroad company by reason of rates theretofore charged, on the theory that such rates were in excess of just and reasonable rates, and therefore in violation of Section 816, Ky. Stats., when the legislature had prescribed no standard as to what were just and reasonable rates, would be the taking of property without due process of law and in violation of both State and Federal Constitutions. The opinion of the Court of Appeals in that case so fully and conclusively demonstrates the correctness of the decision that it seems unnecessary to discuss the matter at length in this brief.

We give the opinion in full in Appendix II.

While under the McChord act the conviction of the railroad company of the same indefinite offense of extortion does not result in the immediate infliction of pecuniary penalties, it does result in the infliction of a forfeiture of all right to make, or be consulted, or heard in regard to, any rate for the future with respect to the particular transportation service involved. As this is a substantial right of great importance to the railroad company, it is entitled to the same protection as if it were capable of valua-

tion in dollars and cents. As a penalty for violating Section 816, Ky. Stats., the legislature has simply substituted for the fine originally imposed the complete forfeiture of the railroad company's right to make rates with respect to the transportation service involved. If it is unconstitutional to deprive the railroad company of its money for a violation of Section 816, it is equally unconstitutional to deprive the company of its right to make rates for a violation of that section.

4. But in the case of the L. & N. R. R. Co. v. Commonwealth, *supra*, the procedure was at least in an ordinary court of justice, and the accused railroad company was accorded the rights accorded to other accused persons, so far as they were available under so vague a statute. The question involved in that case, whether the company had charged more than a just and reasonable rate, was admittedly a question for judicial investigation and determination.

Under the McChord act, however, notwithstanding the serious consequences of an adverse decision of the very same question as to whether the railroad company has charged more than a just and reasonable rate, the railroad company is not given the benefit of the protection or the procedure of an ordinary court of justice, and is not accorded the rights which are accorded to accused persons in courts of justice, but is shut up wholly to the final determination of an essentially non-judicial tribunal.

In Interstate Commerce Commission v. Railway Company, 167 U. S. 499, this Court said:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

When the legislature has chosen to rest the deprivation of a railroad company's right to fix the rate for a particular trans-

portation service upon the question whether the rate the company has theretofore charged for that service is unreasonable, clearly the railroad company is entitled to a judicial determination of that essentially judicial question.

The railroad commission is not a judicial tribunal, and under the Constitution of Kentucky can not be.

Section 27 of the Constitution of Kentucky is as follows:

> "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another, and those which are judicial to another."

Section 28 of the Constitution of Kentucky reads as follows:

> "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Section 109 of the Constitution of Kentucky reads as follows:

> "The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution."

The courts established by the Constitution, in addition to the Court of Appeals, are Circuit Courts (Section 125), Quarterly Courts (Section 139), County Courts (Section 140), Justices' Courts (Section 142), Police Courts (Section 143), and Fiscal Courts (Section 144).

Section 135 of the Constitution of Kentucky reads as follows:

> "No courts save those provided for in this Constitution shall be established."

In Roberts v. Hackney, 58 S W. 810, the Court of Appeals of Kentucky held that the power to hear and determine the offense of contempt and fix the punishment therefor is a judicial power, which, under the Constitution of Kentucky, neither the mayor of a city nor the chairman of the board of trustees of a town can exercise. In its opinion the court said:

> "But by Section 108 of the constitution now in force, the judicial power of the Commonwealth is vested in the courts established thereby. These are the court of appeals, circuit courts, quarterly courts, county courts, justices' courts, police courts, and fiscal courts; Section 143 providing for the jurisdiction of police courts in cities of the sixth class, and Section 160 for the election of the police judge. Under this imperative provision of the constitution, no judicial power can be exercised by any other officer except those named, unless authorized by some other provision of that instrument."

By section 209 of the Constitution a commission was established to be known as "The Railroad Commission," to be composed of three Commissioners. After providing for the method of their selection and the filling of vacancies, the section provides:

> "The powers and duties of the Railroad Commissioners shall be regulated by law; and until otherwise provided by law, the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation as now conferred, prescribed, and allowed by law to the existing Railroad Commissioners."

The Constitution of Kentucky did not establish the railroad commission as a court. At the time of the adoption of the Constitution the railroad commission was essentially a ministerial tribunal. (1 Acts 1881–2, p. 66.) After the adoption of the Constitution the legislature, in pursuance of its powers preserved by Section 209, re-enacted the railroad commission law,

and it was provided that the duty of the commission should be (Ky. Stats., Sec. 821):

> "To see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State."

Thus the railroad commission of Kentucky is essentially an administrative or ministerial tribunal, charged in that capacity with the supervision of the railroads of the State and with the duty of seeing that those railroads obey the laws. Not only is the railroad commission without judicial powers, but it possesses functions and is charged with duties which in the nature of things render it not a fit tribunal to exercise judicial powers.

In Western Union Telegraph Company v. Myatt, 98 Fed. Rep. 335, the United States Circuit Court for the District of Kansas held the act of Kansas creating the Court of Visitation to be in conflict with both the State and Federal Constitutions, because it entrusted to one tribunal final judicial powers as well as wide powers of an administrative and legislative character. The court said (p. 354):

> "In view of what has been said of the court of visitation and the nature of the various powers conferred upon it, would a judicial proceeding before said court to determine the reasonableness of a body of rates be due process of law, within the meaning of the first section of the Fourteenth Amendment to the Constitution?
>
> "Due process of law in judicial proceedings means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In legislative proceedings it requires a conformity to the settled maxims of a free government, and an observance of constitutional restraints and requirements. In either case it means that there should be an omission to exercise substantial powers appertaining to the other department. Courts can not legislate and pass judgment thereon. Legislative bodies, or boards that are constituted as legislative agencies, can not render judgment upon their legis-

lative acts. In either case neither the proceeding nor the result would be due process of law. . . . It would certainly be as inconsistent with our system of jurisprudence to empower them to act judicially in matters whereof they had legislative or administrative cognizance, as it would be to confer judicial powers upon an executive officer. . . . That the important powers of government differing so widely in their essential characters might lawfully be vested in a single board or tribunal, to be exercised upon the life, liberty, or property of a person, is a startling proposition, and it would suggest the inquiry whether our plan of government has not insensibly drifted far away from its ancient moorings."

The same statute came shortly afterward before the Supreme Court of Kansas, and that court likewise held it to be unconstitutional for the same reasons. In the course of its opinion that court said:

"While the line of division between the three powers is not marked distinctly, and it is not always easy to lay down an abstract rule defining each of the separate powers of sovereignty, all courts and all authority unite in holding that the rate-making power is intrinsically legislative. In exercising such power, whether by the legislature or by a commission, general rules prescribing the duties, fixing the rights, and regulating the conduct of persons and corporations in the future are made, and the combining of such a power with those essentially judicial, or vesting it in a court, is a palpable and flagrant violation of the constitutional principle and limitation regulating the separation of the sovereign powers." (State v. Johnson, 60 Pacific, 1068, 1074.)

But not only does the McChord act confer the final judicial power of determining whether the railroad company has in the past been guilty of extortion upon an administrative tribunal, whose general duties are essentially incompatible with the exercise of judicial powers, and thus violate fundamental constitutional principles; the act goes further and offers a direct inducement to that tribunal to decide against the railroad com-

pany the judicial question submitted to it by conferring upon it, in the event of such adverse decision, the distinctly legislative power of making rates for the future, without any notice to or hearing of the railroad company.

Not unnaturally, administrative boards are disposed to extend their power and importance. It is well known that this disposition frequently manifests itself. The McChord act therefore affords a direct and powerful motive to induce the railroad commission to decide against the railroad company the judicial question which the legislature has said must be decided against the railroad company before it can be deprived of any of its rate-making powers.

Appellants' counsel not only concede but insist that the railroad commission is not a court and does not exercise judicial powers. Clearly, therefore, it is not competent to pass upon the essentially judicial question, upon a decision of which the legislature has chosen to base every withdrawal from a railroad company of its power to make any rate.

It must be borne in mind that the result of a decision by the railroad commission adverse to the railroad company on the question whether the company has been guilty of extortion is very much more far-reaching than the mere immediate change in the rate, for it means the permanent forfeiture by the railroad company of any power over the rates for the particular transportation service involved, and the transfer to the railroad commission for all time to come of the power to make the railroad company's rates, without any notice and without any hearing.

We contend, therefore, that the first branch of the McChord act is wholly unconstitutional, because it authorizes railroads to be deprived of the valuable right of making their rates only when they are found guilty of extortion, but fails to define what shall constitute extortion that the company may know how to comply with the law and retain control of its rates; and because it confides the exclusively judicial question whether the company has been guilty of such extortion to an administrative tribunal,

thus depriving the company of the protection of a court of justice, and gives to the non-judicial tribunal which is thus permitted finally to decide this question a direct motive and inducement to decide it against the railroad company, by offering to that tribunal as a reward for such decision, the legislative power to make the railroad company's rates for the future in the matter of the transportation involved.

II.

THE PLAN PROVIDED BY THE McCHORD ACT FOR ENFORCING THE RATES FIXED BY THE RAILROAD COMMISSION DEPRIVES THE RAILROAD COMPANIES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES THEM THE EQUAL PROTECTION OF THE LAW.

1. Certain principles as to the limitations imposed by the Constitution of the United States upon the power of State legislatures or State railroad commissions to make and enforce rates for railroad companies are now so well settled as to need no discussion.

In Smyth v. Ames, 169 U. S. 466, 526, the court, after referring to all its former decisions on the subject, said:

> "In view of the adjudications, these principles must be regarded as settled:
>
> "1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "2. A State enactment, or regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

"3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, can not be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

In Chicago, Milwaukee, etc., R'y v. Tompkins, 176 U. S. 167, the court said:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men; and by this court, in Yick Wo v. Hopkins, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'

"When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

If the question of the reasonableness of the rates of a railroad company can not be so conclusively determined by the legislature of a State, or by regulations adopted under its authority, as that the matter may not become the subject of judicial inquiry, and

if railroad companies have a right of appeal to the courts for the determination of this question, and the right to invoke such judicial inquiry and protection is guaranteed by the Constitution of the United States, then clearly if an act be so framed as to destroy or evade such judicial supervision, that act must be held void if the guarantees of the Constitution of the United States are to be enforced. The McChord act is of this description.

2. By the McChord act the rate fixed by the commission shall be in full force and effect at the expiration of ten days after mailing a copy of the order fixing the same to any officer, agent, or employe of the railroad company, and if the company, or any officer, agent, or employe, shall charge a greater rate for like services, the company and its officer, agent, or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined, for the first offense not less than five hundred dollars nor more than one thousand dollars, upon a second conviction not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions not less than two thousand dollars nor more than five thousand dollars. It is clear from the language of the act that if the railroad company does not reduce its rate, as required by the railroad commission, and an indictment be found against it for charging a higher rate, the only question in the case is the simple question of fact, whether the company has charged a greater rate than the commission has fixed. From the express and unmistakable language of the act it necessarily results that the rate fixed by the commission must be enforced by the imposition of heavy penalties, and without any opportunity for the railroad company to show that the rates so fixed are unreasonably low.

In Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, the State attempted to compel the railroad company to observe the rates fixed by the commission by issuing a writ of mandamus, and denying to the railroad company the right in that proceeding to

question the reasonableness of the rates fixed by the commission. Under the McChord act the State attempts to compel the railroads to observe the rates fixed by the commission by means of prosecutions, wherein the railroad company has no opportunity to demonstrate the unreasonableness of the rate. The cases, therefore, seem exactly parallel, and the McChord act is in conflict with the Constitution of the United States, as was the Minnesota act.

The question thus presented, whether an act providing for the enforcement of rates fixed by a railroad commission through the exclusive means of prosecutions and penalties, thus depriving the carrier of an opportunity to invoke judicial protection against unreasonably low rates, is in conflict with the Constitution of the United States, has not been decided by this Court.

In the case of Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, this Court expressly declined to pass on the constitutionality of the section of the Texas act whereby it was sought to enforce the commission's rates by penalties, and also declined to pass on the question of the constitutionality of that section of the Texas act providing that until set aside in a direct proceeding for that purpose, the rates made by the commission should be deemed conclusive in all actions between private individuals and the companies. The Court pointed out that these two provisions were separable from the rest of the act, as there were many important provisions of the act which could be enforced independently of these provisions, and that, therefore, the rest of the act could stand without them, and said:

> "We, therefore, for the purposes of this case, assume that these two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration."

In the case at bar the question as to the constitutionality of a statute prescribing only penalties for the enforcement of the rates of a railroad commission is directly involved, and if such

a scheme standing alone is unconstitutional, then this act as a whole must fall to the ground, because in this act the provision as to penalties can not be separated from the rest of the act, for all the rest of the act was obviously intended merely as a basis for the penalties.

As already stated, the Court of Appeals of Kentucky, in the case of L. & N. R. R. Co. v. Commonwealth, 99 Ky. 132, held that a criminal prosecution could not be maintained against a railroad company for extortion. The McChord act was passed for the avowed purpose of supplying that defect, and of authorizing the enforcement of the statute as to extortion by means of criminal prosecutions. An examination of the act will show that, aside from the procedure outlined before the commission with a view of divesting the railroad company of power to make rates in particular instances, and lodging that power in the railroad commission, the act deals with nothing but prosecutions. Section 1, which provides the steps necessary to vest the commission with the power to make rates, and the steps necessary in order that the rates made by the commission shall go into effect, provides nothing further except very heavy penalties for not charging the rates fixed by the commission. Section 2 provides solely what courts shall have jurisdiction of the *prosecutions* against the railroad company and against its officers, agents, and employes. Section 3 provides merely that "*prosecutions* under this act shall be by indictment." Section 4 provides merely a limitation of two years within which *prosecutions* shall be commenced. Section 5 deals merely with one of the details of procedure before the commission, and authorizes the commission to take depositions. The letter and the spirit of this act are "prosecutions" and nothing else.

The penalty prescribed for a violation of Section 816, Ky. Stats. (which section was held not enforcible as a criminal statute in L. & N. R. R. Co. v. Commonwealth, already referred to), was provided for by Section 819, Ky. Stats., which reads as follows:

"Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line or railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued."

It will be observed that Section 819 not only provided for a prosecution and denounced penalties against the railroad company guilty of extortion, but it also provided that the railroad company should be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees, and prescribed a limitation both for prosecutions and actions. The McChord act, however, provides for no civil action, nor does it provide for any limitation for civil actions. It deals exclusively with penalties and prosecutions, and inasmuch as the method of enforcing the Commission's rates by prosecutions, wherein no opportunity is afforded for questioning the reasonableness of those rates, is in conflict with the Constitution of the United States, the whole act must fall.

3. Appellants' counsel do not seriously controvert the proposition that the imposition of a penalty for failing to charge the rate fixed by the commission without opportunity to show that that rate is unreasonably low makes that method of enforcement subject to the constitutional objections which we urge, and which in Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, were held fatal to the method of enforcement by mandamus which excluded inquiry into the reasonableness of the rates. But they argue that if the Supreme Court of Minnesota had construed the Minnesota act as authorizing the court upon the trial of the mandamus proceeding to entertain an inquiry as to the reasonableness of the rates, then this Court would not have declared the Minnesota statute or the method of its enforcement unconstitutional. And they claim that the Kentucky Court of Appeals may hold that upon the trial of an indictment for failure to observe the rate made by the commission the court may entertain a similar inquiry as to the reasonableness of the rate, and that such holding would make the McChord act constitutional.

The first objection, however, to this suggestion is that such a construction is wholly unwarranted by the language of the statute, and while if the Court of Appeals of Kentucky had actually disregarded all rules of construction and had indulged in a piece of judicial legislation by so changing the McChord act as to conform to the theory advanced by appellants' counsel, that construction might possibly be regarded as binding upon this Court, clearly this Court should not indulge the presumption that the Court of Appeals of Kentucky will thus invade the domain of the legislative department, but it must assume that the court would place a construction upon the act not inconsistent with its plain terms.

There is nothing in the language of the McChord act which can be distorted into supporting the theory that the legislature intended any such inquiry into the reasonableness of the commission's rates in the prosecutions provided against the railroad

companies and their employes. The legislature expressed its intention in the simplest, clearest language. It provided that if the railroad company, or its officer, agent, or employe should charge a greater rate than that fixed by the commission, the company and its officer should each be deemed guilty of extortion, and upon conviction should be fined in the sums mentioned in the act, varying from five hundred to five thousand dollars. There is no room here for construction. If the company or its agent charge for any shipment more than the rate fixed by the commission, the penalty attaches. There is absolutely nothing in the act to indicate that the legislature intended that each jury which tried an indictment should not only try the violation of the rate fixed by the commission, but should also try the legality of that rate. The uncertainty and confusion which would result from any such method of enforcing the penalties reinforces the conclusion that the legislature could not have intended any such consequences. Manifestly the legislature intended that which its simple and direct language necessarily means.

In United States v. Reese, 92 U. S. 214, the Court said:

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there.* Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachment upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In the Trademark Cases, 100 U. S. 82, the Court said:

"While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enfore the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

And after quoting from United States v. Reese, *supra*, added:

"If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trademark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under State law."

In Spraigue v. Thompson, 118 U. S. 90, the question was whether Section 1512 of the Code of Georgia relating to pilotage was valid in view of the fact that it contained provisions in

conflict with Section 4237 of the Revised Statutes of the United States. The Court said:

> "The section of the Georgia Code, above quoted, does contain such discriminations as are prohibited by Section 4237, Rev. Stat. It excepts from its operation 'coasters in this State,' and 'between the ports of this State and those of South Carolina,' and 'between the ports of this State and those of Florida.'
>
> "It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separate part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of Section 1512 of the Code of Georgia can not be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Section 4237 of the Revised Statutes."

For the court to attempt to qualify the McChord act by putting aside its express language relative to prosecutions and substituting therefor another method of procedure, in order to make the act conform to the Constitution of the United States, would be a direct violation of the principle illustrated by the cases just cited, and by inserting words not in the statute would give an effect to it radically different from that clearly indicated by its plain language. If such judicial amendment should be permitted in this case, then it is difficult to see how any statute could ever be held to be in conflict with any constitution, for the court could redraft it so as to meet the court's views as to the constitutional requirements, and so as to express the

court's views as to what the legislature would have enacted if it had been properly advised.

But here we are not left to mere surmise as to whether such a modification of the act would have been agreeable to the legislature. The McChord act originated in the Kentucky Senate. When it was sent to the House of Representatives it was referred to the Committee on Railroads. That committee reported the bill back to the House and proposed six amendments thereto, which read as follows:

> "1. Amend section 1, line 2, after the word 'made,' the words 'in writing.'
>
> "2. Amend section 3 by adding, after the words 'prosecution under this act shall be indictment,' the words 'upon information filed before the grand jury by the Railroad Commission, or any member thereof, and the defendant shall be permitted upon trial to introduce proof to rebut the presumption of guilt raised by a violation of any order of the commission fixing a rate, toll, or compensation.'
>
> "3. To amend section 2 by striking out after the word 'officer,' in line 7 thereof, the words 'agent or employe.'
>
> "4. Amend section 1, line 11, by inserting after the word 'same' the words, 'And shall hear and reduce, or cause to be reduced to writing, all evidence adduced by the parties, and such other evidence as they may desire to hear.'
>
> "5. Amend section 1 by striking out after the word 'officer,' in line 28 thereof, the words 'agent or employe.'
>
> "6. Amend section 1 by inserting in line 18 thereof, after the word 'rendered,' the following words: 'Provided, That said commission shall not by any rate, toll or compensation which it shall make and fix under this act give to any railroad corporation an undue or unreasonable preference, or give any undue or unreasonable preference to any individual, company, firm or locality located on the line of any railroad doing business in this Commonwealth.'" (House Journal, 1900, pages 533, 534.)

These amendments were rejected (House Journal, 1900, pages 537, 538, 539), and the bill was passed without amendment (House Journal, 1900, page 541). The legislature thus evinced unmistakably its intention that the rates fixed by the railroad

commission should be regarded as conclusive and enforced accordingly by the imposition of heavy penalties. The portions of the House Journal referred to are set out in Appendix III.

4. But even if the language of the McChord act warranted the construction that upon the trial of an indictment for charging a higher rate than that fixed by the commission the defendant might question the reasonableness of that rate, the case would still be essentially different from what the Minnesota case would have been if the State court had construed the Minnesota act as authorizing the court in the mandamus proceeding to investigate the reasonableness of the commission's rates. Such an opportunity for judicial investigation and protection upon the trial of the mandamus proceeding would be substantial and adequate. If the railroad company failed in its attempt to demonstrate the unreasonableness of the rate of the commission, the result would be the natural and just one of requiring the company to conform to that rate for the future. No penalty would be imposed upon the company for having presumed to seek in this statutory manner the judicial protection guaranteed to it by the Federal Constitution. But a judicial investigation as to the reasonableness of the commission's rate, upon the trial of an indictment, is purely illusory and absolutely worthless. If the railroad commission makes a rate which the railroad company conceives is unreasonably low, and the company seeks in pursuance of the method prescribed by the McChord act to question the reasonableness of the rate, it must simply decline to observe that rate. Of course hundreds, and perhaps thousands, of shipments on which the McChord act requires it to charge not exceeding that rate will pass over its road in a very short period. The Company may be indicted many times in every county in the State through which its line runs, and in Franklin county whether its line runs through that county or not. In view of the fact that the Commonwealth's attorneys in Kentucky get fifty per cent of fines, there will be no doubt as to the promptness and frequency with which the

railroad company will be indicted. Upon the trial of those indictments before juries, and in accordance with the ordinary criminal procedure, the railroad company would be given, according to contention of the appellants' counsel, the right of laying before the jury the complicated and intricate details of its operations and earnings for the purpose, if possible, of convincing the jury that the rate fixed by the railroad commission is unreasonably low. If in any case it succeeds in establishing this fact, it is simply relieved from the penalty for that one shipment. The rate still exists as a constant invitation to further indictments, and the company can have no assurance that the next jury may not decide on the same evidence that the rate is unreasonable. If in any case the company fails to satisfy the jury that the rate is unreasonably low, the result is not to require the railroad company to charge that rate for the future, or to furnish it with any certain guide as to whether it should do so, but is to impose upon it a very heavy penalty for its having done the only thing it could do in order to bring about a judicial hearing in the statutory method, *i. e.*, refraining from charging the rate fixed by the commission. Surely if a railroad company has any real constitutional right to a judicial investigation as to the reasonableness of rates fixed by a commission, this sort of procedure is the veriest travesty upon justice. A favorable decision gives the company no protection for the future; an unfavorable decision imposes a heavy penalty upon it for having invoked judicial protection.

As a practical matter, therefore, the right, even if it exists, to have an inquiry upon the trial of an indictment into the reasonableness of the commission's rate, would be absolutely worthless to the railroad company. The questions involved are so intricate, the results of jury trials, even of cases of the greatest simplicity, are so uncertain, and the penalties imposed are so severe that no railroad company could afford to refuse to comply with any rate which the commission might make, and the result of the act, with any such construction, would be exactly what

was the obvious purpose of the legislature—and that is, that the railroad companies should be compelled to charge the rates imposed by the commission, no matter how low they might be.

In Chicago, Milwaukee, etc., R'y v. Tompkins, 176 U. S. 167, this court said:

> "Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. . . . When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clause of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state, or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated."

After discussing the findings of the lower court in that case the Court said:

> "We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In Smyth v. Ames, *supra*, a similar case, he, as Circuit Judge presiding in the Circuit Court of Nebraska, undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master. Very likely the practice pursued by him induced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light mat-

ter to permit such legislation to wreck large property interests."

It surely can not be that a railroad company's constitutional right to a judicial investigation into the sufficiency of rates prescribed for it by a commission is satisfied by permission to submit to juries in criminal proceedings questions of such complicated and delicate character, especially when that permission is coupled with the assurance that if the jury does not accept the railroad company's theory, then the company is to be subjected to most excessive penalties because it has chosen to question the correctness of the rates.

The case would not be simplified by the fact that perhaps only one rate at a time would be made by the commission or involved in an indictment. On the contrary, the difficulties of the investigation would be much increased, for it is obviously easier to consider an entire body of rates within a State and decide what their effect will be upon a railroad company than to say that any change in any single rate will violate the railroad company's constitutional rights. Indeed, this seems another of the evidences which are afforded on every hand that the McChord act was designed to eliminate entirely any practical opportunity for the railroad companies to have judicial protection. On account of the interdependence of all rates, the scope of the inquiry as to the reasonableness of any particular rate would perhaps be as extensive as an inquiry as to the reasonableness of an entire body of rates, and there would be the additional embarrassing circumstance, that it could always be argued that even though the particular rate might be so low as to be unremunerative, still it could not be presumed that the Commission would change additional rates so as to make the company's business as a whole unremunerative, and that therefore there was no taking of property without due process of law.

Assuming that the railroad company can show to the jury on the trial of the prosecution that the commission's rate is

unreasonably low, the case amounts to this: That the railroad company is guilty of extortion unless it can convince the jury that the rate fixed by the commission is unreasonably low. No standard is prescribed as to what is a reasonably low rate. The railroad company's escape from the penalty, therefore, depends exclusively upon the jury's conclusion as to what amounts to an unreasonably low rate. In this aspect the case is the exact counterpart of the case of L. & N. R. R. Co. v. Commonwealth, 99 Ky. 132, where it was held that to impose a penalty upon a railroad company for charging a rate greater than a jury might think was just and reasonable would be to deprive the company of its property without due process of law, in violation of both State and Federal Constitutions. Clearly just the same uncertainty will exist, and injustice result, if the railroad company is permitted to be fined under the McChord act, even though it may be permitted to attempt to convince the jury that the rate fixed by the commission is unreasonably low. In the case cited, in referring to Sections 816 and 819, Kentucky Statutes, already quoted, the court said:

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' can not be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded.
>
> "The *criminality* of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.
>
> "That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant

to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

"If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws."

It may be said that the rate fixed by the railroad commission is the standard, but this necessarily begs the question, when we are considering whether the railroad company is afforded by the act a fair opportunity to question the correctness of that so-called standard. It necessarily results that when this standard is put on trial the jury is left without any standard to guide it, and the railroad company's subjection to or escape from the heavy penalties of the act depends solely on the jury's view as to what is a reasonable rate, so that the company can never know when it is committing a crime.

In United States v. Reese, 92 U. S. 214, the Court said:

"Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

Inasmuch as the McChord act has made no provision for an antecedent opportunity on the part of the railroad company to invoke the judicial inquiry to which it is entitled before imposing penalties, then if it be held that this judicial inquiry may be had upon the trial of the prosecution, then clearly the company can not know with certainty when it is committing a crime, and to subject it to penalties under such circumstances is to make the act in conflict with both the State and Federal Constitutions

in the respects indicated by the Court of Appeals of Kentucky in L. & N. R. R. Co. v. Commonwealth.

5. Not only does the sole method prescribed in the McChord act for enforcing the commission's rates deny the railroad companies that judicial investigation to which they are entitled, but it is necessarily inconsistent with and defeats any other method to which otherwise the railroad companies might attempt to resort, as by way of a bill in chancery, and the act seems to have been studiously devised so as to accomplish this complete evasion from judicial scrutiny.

Appellants' counsel lay special stress on the fact that by the McChord act the commission is not charged with the enforcement of the rates which it fixes; that after the commission makes a rate, it has nothing further to do with the subject. Under Section 819, Ky. Stats., hereinbefore quoted, indictments against the railroad company for extortion could be found only upon the recommendation of the railroad commission. This supervisory control over indictments is taken away by the McChord act, and, although it was proposed in the House to amend the act by providing that indictments should be upon the recommendation of the railroad commission, or of some member thereof, the amendment was rejected. This was evidently done with the deliberate purpose of frustrating any interference with the enforcement of any rates made by the commission by injunction or otherwise.

Under the McChord act, when the Commission makes a rate, and mails a copy of its order to any employe of the railroad company, its connection with the matter ceases, and ten days from the time that letter is mailed it becomes a crime, punishable by heavy penalties, for the railroad company to charge more than the rate so fixed. Obviously, if the rate is unreasonably low, there is no one whom the company can enjoin so as to prevent the enforcement of the rate.

We think it is clear, therefore, that the McChord act renders it absolutely impossible for the railroad company in any manner

by a bill in equity or otherwise, to secure the judicial protection to which it is entitled under the Constitution of the United States.

In Fitts v. McGhee, 172 U. S. 516, 531, it is settled that the courts are without jurisdiction to enjoin the officers of the State from instituting and prosecuting criminal proceedings in the State courts under an act which charges them with no special duty in connection with it. If the commission, therefore, once fixes a rate under the McChord act, there will be nobody to enjoin, and the only hearing in court which a railroad company could secure will be in defending indictments, and for the purpose of showing that a rate fixed by the commission is unreasonably low. This opportunity for a hearing in court would be the merest pretense and sham, and utterly without practical value, as has already been shown, even if under the McChord act the court should on the trial of the indictment go into the question of the reasonableness of the rate fixed by the commission.

But we conceive that the unconstitutionality of the act does not have to rest upon the fact that the act precludes all possibility of judicial protection in any direction, for where the only method of enforcement prescribed by the act itself is of such a character as to deny absolutely the opportunity therein for such judicial investigation as the railroad company has the right to demand, then clearly that method of enforcement must be unconstitutional, whether there may be an independent procedure or not; otherwise the case of Chicago, etc., Railway Company v. Minnesota, 134 U. S. 418, was incorrectly decided, for there the Court held that the act as construed by the Supreme Court of Minnesota was in conflict with the Constitution of the United States, because it failed to afford the railroad company an opportunity *in the statutory proceeding for enforcing it* to show the unreasonableness of the rates fixed by the commission. In that case it appeared that the commission fixed the rates on milk on August 4, 1887, and published the tariff on October 14, 1887, and did not take steps for the writ of mandamus until December

6, 1887. The railroad company had had, therefore, ample opportunity to resort to relief by way of injunction if it had chosen to do so. It elected not to do so, but to test the matter in the statutory procedure for enforcing the rates.

This Court held, because that procedure did not afford the judicial investigation to which the railroad company was entitled, the act was in conflict with the Federal Constitution. In precisely the same way we contend that the railroad companies, under the McChord act, have the right to await the statutory method for enforcing the rates fixed by the commission, and if that method does not afford the judicial investigation to which the companies are entitled, that method is necessarily in conflict with the Federal Constitution.

Clearly, if the legislature prescribes a method of enforcing rates fixed under its authority, it must not ignore the vital principle that the railroad company is entitled to judicial protection, and must not adopt a system of enforcement which amounts to coercing the company into charging the rates fixed by the commission in a proceeding which for all practical purposes denies the judicial investigation which the company has the right to demand.

6. The principles for which we contend do not at all militate against the fair and reasonable regulation of railroad rates by railroad commissions. The application of these principles would not involve the validity of any other railroad commission act in the United States. The McChord act is unique in that it alone has singled out the one method of enforcement of rates made by a railroad commission which necessarily completely ignores the railroad company's constitutional rights. Other acts may likewise provide penalties, but they are comprehensive acts of regulation, like the Texas act involved in Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, and in which, as this Court pointed out, the provision as to penalties may be disregarded, and yet the useful features of the act retained.

In many of the railroad commission laws of this country, such, for instance, as that of Louisiana (Constitution of Louisiana, Sections 283 to 289); North Carolina (act of the General Assembly of North Carolina of March 6, 1899); Nebraska (Section 4061, Compiled Statutes of Nebraska of 1897); Minnesota (Chapter 10, General Laws of 1887); and Texas (Act of April 3, 1891), express provision is made for judicial review, while the acts in other States require or authorize proceedings by way of mandamus or injunction by the railroad commission to enforce the rates fixed by them, wherein the carrier may be given a practicable and fair opportunity to secure the judicial investigation to which it is entitled, and not another act, so far as we have been able to find, has devoted itself entirely, as does the McChord act, to an attempt to provide the machinery for the imposition of heavy penalties against the railroad company. The McChord act seems to be the only instance where legislative regulation of this character has been directed not to a fair and comprehensive treatment of this most important subject, but to a deliberate attempt to harass the railroad companies by the imposition of heavy penalties without the opportunity for judicial investigation of those questions which under the Constitution of the United States the railroad companies are entitled to have passed upon by the courts.

III.

A Court of Equity Has Jurisdiction of These Actions.

A considerable part of the brief for the Railroad Commissioners is devoted to a discussion of the question as to whether equity has jurisdiction of such a case as this; or, in other words, whether there is any right to enjoin the Railroad Commission from proceeding under the terms of this act.

It is admitted that if the legislature or a commission fixes a rate or rates, then the carrier or other public servant whose rates are thus fixed can, if they are unreasonable or confiscatory in their character, come into a court of equity and enjoin the Railroad Commission, or such other public official as has the duty imposed upon him to enforce such rates, from so doing. But, it is said, that where the duty simply rests upon the commission to fix the rate, and there is no duty upon it to enforce the rate, then there is no remedy at all in a court of equity; no remedy by way of injunction against the commission from enforcing the rate, because no duty is imposed upon it by law to enforce such rate, and no remedy against the Commission making the rate, because in making the rate the action of the commission is legislative in its character.

The effect of this argument in such a case as the one at bar is, therefore, that it is competent for the legislature to pass an unconstitutional law, giving to such a body as a railroad commission the right to fix a rate or rates, and making the rate or rates thus fixed conclusively binding upon the carrier, and yet, because the legislature does not confide in any particular commission or official the duty of enforcing these rates, but prescribes penalties for their violation, the carrier is without any remedy except such as it may have in defending a prosecution brought for its violation of the rate so fixed.

Certainly counsel for the appellants have cited no case holding this doctrine. Nor do we believe that such can be the law.

We admit that the fact that an act is unconstitutional does not, by itself, give a court of equity jurisdiction to enjoin its execution. In Cruikshank v. Bidwell, 176 U. S. 73, this court says:

> "It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of law, or that the case falls under some recognized head of equity jurisdiction."

That case was one of a bill filed by an importer to enjoin a receiving officer from detaining divers invoices of tea. This court held there was an adequate remedy at law, as the value of the tea was readily capable of being ascertained.

The cases illustrative of when the court will not and when it will take jurisdiction in equity cited in this case are substantially as follows:

Shelton v. Platt, 139 U. S. 591; Allen v. Pullman Palace Car Company, 139 U. S. 658.

These are cases where an effort was made, in the one, to enjoin the collection of a tax upon property of the United States Express Company, and in the other to enjoin the collection of a tax upon the property of the Pullman Palace Car Company by the authorities of Tennessee. No irreparable injury was shown; no multiplicity of suits threatened, and the act under which the taxes were being collected expressly provided that if the tax was paid under protest and wrongfully paid, it could be recovered back.

The case of Pacific Express Company v. Seibert, 142 U. S. 339, is also a tax case—an effort upon the part of the Pacific Express Company to enjoin the State of Missouri from levying certain taxes. There are general expressions in this case in regard to the jurisdiction. The case had no merit for the Express Company, and for that reason the dismissal of the bill was affirmed.

In Pittsburgh Railway Co. v. Board of Public Works, 172 U. S. 32, an effort was made upon the part of the State of West Virginia to assess for taxation a bridge. The owners of the bridge entirely failed to take any means to correct, before the Board of Assessment, the mistakes in assessment, or to pursue any other remedies given by the statute to prevent an unjust valuation. And this court held that under these circumstances a court of equity would have no jurisdiction.

In Arkansas Building & Loan Association v. Madden, 175 U. S. 269, it appeared that by paying the tax for doing business in the State—$250—the whole trouble could have been avoided, and that if the tax was unlawfully exacted the company could recover it back.

On the other hand, the cases of Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, and Smyth v. Ames, 169 U. S. 516, are referred to as illustrating the inadequacy of the remedy at law where the case made demands preventive relief; as, for instance, the prevention of a multiplicity of suits. The first of these cases was a bill filed by the Union Pacific Railway in which it was alleged that if the assessment was made upon its property it would be subjected to numberless suits along its line. The other case was a suit by various railroad companies to enjoin the Board of Railroad Commissioners of Nebraska from putting into effect the Nebraska rate law, and Mr. Justice Harlan fully points out the nature and ground of equity jurisdiction in such a case, resting upon the danger of a multiplicity of suits. We quote as follows:

> "The first question to be considered is one common to all the cases. While it was not objected at the argument that there had been any departure from the 94th Equity Rule, it was contended that the plaintiffs had an adequate remedy at law, and that the Circuit Court of the United States, sitting in equity, was therefore without jurisdiction. This objection was based upon the fifth section of the Nebraska statute authorizing any railroad company to show, in a proper action brought in the Supreme Court of the State,

that the rates therein prescribed are unreasonable and unjust, and if that court found such to be the fact, to obtain an order upon the Board of Transportation permitting the rates to be raised to any sum in the discretion of that Board, provided that in no case should they be fixed at a higher sum than was charged by the company on the first day of January, 1893. This section, it is contended, took from the Circuit Court of the United States its equity jurisdiction in respect of the rates prescribed, and required the dismissal of the bills.

"We can not accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he can not be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. (Omitting authorities.) But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. (Omitting authorities.) A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. (Omitting authorities.) So, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal Courts to maintain a like defense. A State can not tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts (omitting authorities).

"In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of

certain rates for transporation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter, or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."

The other illustrative case cited in Cruikshank v. Bidwell, *supra*, is Watson v. Sutherland, 5 Wallace, 74. That was a case where an effort was made to attach a certain stock of goods which had been purchased by a young merchant, and which he was using to carry on his trade, upon the ground that he had bought them fraudulently from an insolvent. The court held

that as it would have ruined his business to take away from him this stock of goods, the damage would have been irreparable, and therefore he was entitled to come into equity.

In L. & N. R. R. v. Railroad Commission of Tennessee, 19 Fed. Rep. 679, a bill like this was sustained upon the ground of the unconstitutionality of the Railroad Commission law; and the railroad commissioners were perpetually enjoined from attempting to execute it.

In Stone v. Farmers Loan & Trust Co., 116 U. S. 307, the Circuit Court entertained a bill similar in character to this, and this court, while reversing the decree of the Circuit Court, made no question upon the jurisdiction in equity if the cause had been a meritorious one.

In Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, the Railroad Commission of Texas had, it is true, already fixed a schedule of rates, but the Circuit Court not only enjoined the commission and the Attorney General of Texas from enforcing this schedule of rates on the theory that they were unreasonably low, but it further enjoined the commission from making any further tariffs or orders, or discharging the duties imposed by the railroad commission act, on the theory that certain sections of that act were unconstitutional, and that their invalidity rendered the whole act void. This Court affirmed the decree of the Circuit Court enjoining the enforcement of the rates already made, on the ground that those rates were unreasonably low. It reversed so much of the decree as enjoined the railroad commission from discharging the duties imposed by the act, on the ground that, even conceding the unconstitutionality of the particular sections assailed, the rest of the act was constitutional, because separable from those provisions; but this Court made no question as to the jurisdiction in equity to restrain the commission from taking any steps under the act if the Circuit Court had been right in its view that the act as a whole was unconstitutional.

These seem to us to be cases precisely in point.

In Chicago & Northwestern Railroad v. Day, 35 Fed. Rep. 882, Mr. Justice Brewer, then Circuit Judge, points out the reasons for the remedy in equity. He says:

> "Equity interferes to prevent a multiplicity of suits, and where one act may be the foundation of many suits the courts have a right, and it is their duty in the first instance, to stay that act, if unlawful. Take this illustration: Suppose a board of assessors were charged with the duty of assessing property of the complainants, and that after such assessment was made an apportionment of the property between one hundred different townships was to follow; then warrants of collection to be issued and served by officers of these townships—if the property of the company was in fact exempt from taxation, would it be contended that it might not have injunction to stay the assessments rather than await to litigate with the one hundred different collectors the validity of their warrants? And in this case, beyond the mere matter of multiplicity of suits, is the fact that the penalties imposed are large, and while that of itself might not justify interference, it certainly adds force to the argument of multiplicity of suits."

A similar remedy in effect was allowed to the receivers of a railroad company against the railroad commissioners of South Carolina, who had endeavored to make a change in the rates for transportation of liquors in glass. (Clyde v. Richmond & Danville R. R., 57 Fed. Rep. 436.)

Again, in Southern Pacific Railroad Company v. Board of Railroad Commissioners, 78 Fed. Rep. 238, in a suit of the Southern Pacific Company against the Railroad Commissioners of California to enjoin them from putting into effect certain rates, a similar remedy was had.

So in Georgia Banking Company v. Smith, 128 U. S. 177, where the suit was to enjoin the Railroad Commission of Georgia from putting into effect certain rates, there being a penalty for violating the rates, and the complainant contending that it had a contract which would be impaired by such action, no question was made of the jurisdiction of the court or the propriety of the remedy, although the case was decided against the contract.

So in Cotting v. Kansas City Stock Yards Co., 79 Fed. Rep. 680, there was a suit to enjoin the putting into effect of certain rates prescribed by the legislature for services of stock yards. The suit was by certain stockholders, and the defendants were the Kansas City Stock Yards Company and the Attorney General of the State of Kansas. The court said:

> "There has been some discussion about the jurisdiction of this court but it is not seriously challenged, and the objection to the Attorney General that he is improperly made a party defendant is not well taken, as the court has jurisdiction to enjoin a State officer from enforcing an unconstitutional law."

It is true that in many of these cases the commission had put into effect certain rates, or at least prescribed them, which were alleged to be unreasonable or unlawful as inimical to a contract between the complainant and the State; but this was not made the ground or basis of the jurisdiction. On the contrary, the jurisdiction was rested upon the irreparable injury that would be suffered by the complainant either immediately from the conduct of the defendant or from such a result following from that conduct as a multiplicity of suits, and the danger of being subjected to a multiplicity of penalties.

We take the liberty of quoting quite extensively from the case of Bank of Kentucky v. Stone, 88 Fed. Rep. 390, because this case, with the others similar thereto and decided at the same time, all came to this Court and were reversed or affirmed without any challenge whatsoever of the jurisdiction of the court, although, in the brief of counsel for the State Board of Valuation and Assessment of Kentucky and of the City of Louisville, the jurisdiction was strongly assailed.

> "Taft, Circuit Judge (after stating the facts). The bill attacks the validity of the Kentucky revenue law of November, 1892, and seeks relief against its enforcement on the ground that, in its application to the complainant bank, it violates that clause of the Federal Constitution which forbids

a State to pass a law impairing the obligation of a contract. The case is therefore one arising under the Constitution of the United States, and, as it involves more than $2,000, it is within the jurisdiction of this court. Do the facts stated in the bill bring it within the equity jurisdiction of this court? It is well settled that in the federal courts an action in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void, and independently of every other consideration. See Rich v. Braxton, 158 U. S. 375, 405. It must appear from the special circumstances averred that there is no adequate remedy at law, and that there is some recognized ground for equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury. Ogden City v. Armstrong, 168 U. S. 224, 236, 18 Sup. Ct. 98; Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250; Allen v. Car Co., 139 U. S. 658, 661, 11 Sup. Ct. 682; Shelton v. Platt, 139 U. S. 516, 525, 5 Sup. Ct. 601; Hannewinkle v. Georgetown, 15 Wall. 547; Dows v. City of Chicago, 11 Wall. 108. What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may, under the duress of the threatened trespass, pay the taxes alleged to be illegal, and then sue the city of Louisville, the county of Franklin, and the city of Frankfort to recover them back. Railroad Co. v. Commissioners, 98 U. S. 541. It is to be observed, however, that no such action will lie except upon payment under duress. The bank could not simply pay under protest, and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy, as there was in Tennessee in the case of Shelton v. Platt. The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint. But the collecting officers are not obliged to collect the taxes by distraint; they may resort to a simple suit at law for them. In that case the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be adequate; but, under the provisions of the revenue law of November, 1892, we do not think it is. By that law, the bank, on failing to pay the taxes assessed, according to its provisions, within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent,

and to a fine of $50 a day for every day of the delinquency, to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity the bank may enjoin the assessment, and, pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant, because, by the terms of the act, they do not begin to accrue until thirty days after notice to pay has been given by the collecting officer. It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk, which is absent in an action in equity. The remedy at law is therefore entirely inadequate. Smyth v. Ames, 169 U. S. 466, 518, 18 Sup. Ct. 418; Express Co. v. Seibert, 44 Fed. 315. It is no answer to say that the payment of the tax and the action to recover it back constitute an adequate remedy, because no such action will lie, as already explained, unless these is a distraint, actual or threatened, and the collecting officer, by not distraining, may wholly deprive the taxpayer of this remedy. Indeed, the counsel for the City of Louisville vigorously contends that the collecting officer in that city has no power to distrain for bank taxes. However this may be, it would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law can not be adequate, if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' Boyce v. Grundy, 3 Pet. 210, 215; Sullivan v. Railroad Co., 94 U. S. 806, 811. And the application of the rule depends upon the circumstances of each case. Watson v. Sutherland, 5 Wall. 74, 79. . . . In addition to the suits for future taxes, there is also danger of harassing suits for fines and penalties which the law permits to be brought for each day's delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the act of November, 1892, violates an exemption secured to it by contract, it may have equitable relief."

The case of Fitts v. McGhee, 172 U. S. 516, is not opposed to this view. The court there held that the suit was against the State. The court said, in commenting upon the cases relied on by counsel for complainant, such as Poindexter v. Greenhow, 114 U. S. 270; Reagan v. Farmers Loan & Trust Co., 154 U. S. 362; and Smyth v. Ames, 169 U. S. 466:

> "Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a State enactment, alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official position under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former, as the executive of the State, was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes."

This extract shows the wide difference between that case and the one at bar. For here the suit is to enjoin specified officials from exercising a specified power, upon the ground that the law conferring this power is unconstitutional and void, and the equitable jurisdiction rests upon the obvious consequence of the exercise of this unconstitutional mandate.

It would seem to be almost too plain for argument that these consequences are such as can not be compensated for by any suit which the railroads could bring after the commission had acted. For here the case just cited would meet us as a controlling authority against any suit to enjoin the prosecuting officers of the State from insisting upon the penalties incurred through our violation of the order made by the Railroad Commission, and as the Railroad Commission would, by the very terms of the statute, be *functus officio* as to that rate, there would be nothing for the railroad companies to do but submit to the hazard of being subjected to numerous public prosecutions and to the infliction of the extreme penalties denounced by this law.

It would seem, therefore, that no stronger case could be presented of the necessity for preventive relief and the interposition of an equitable tribunal in anticipation of irreparable damage.

We respectfully submit, therefore, that the objection to the jurisdiction of the court is not well founded.

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For Appellees.

JAMES P HELM,
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A. M. J. COCHRAN,
Of Counsel.

APPENDIX I.

Sections 816 and 819, Ky. Stats., referred to in the foregoing brief, together with the intervening sections, are as follows:

"SEC. 816. *Extortion—what is.* If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion.

"SEC. 817. *Discrimination—what is.* If any corporation engaged in operating a railroad in this State shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects, or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

"SEC. 818. *Preference or advantage forbidden—rules defining same—quantity of freight.* It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. When one or more car loads of freight shall be transported at the same time for different persons, and for each shipper a car load or more, such shipment shall be considered and taken as the same quantity of freight within the meaning of this law; and when less than a car load of freight, and over five thousand pounds are transported at the same time for different shippers, and for each shipper over five thousand pounds, such shipment shall be considered and taken as the same quantity of freight; and when over five hundred pounds and less than five thousand pounds are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipment shall be considered and taken as the same quantity of freight.

"SEC. 819. *Penalty and damages for extortion—discrimination, preference — jurisdiction — duty of Commission — limitation.* Any railroad company that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand nor more than five thousand dollars. The circuit court of any county into or through which the line or railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court, shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued."

APPENDIX II.

The Opinion of the Court of Appeals of Kentucky in Louisville & Nashville Railroad Company v. Commonwealth, 99 Ky. 132.

Judge Hazelrigg delivered the opinion of the Court:

The indictment in this case charges that the appellant "did unlawfully charge, collect, and receive from A. Vancleave & Co. the sum of $41.70 as toll or compensation for the transportation of a car load of coal, weighing 53,800 pounds, being at the rate of $1.55 per ton, from Pittsburg, Ky., to Lebanon, in Marion County, over the line of said railroad, a distance of —— miles, the said rate of $1.55 per ton for the said transportation of said coal being more than a just and reasonable compensation therefor, contrary to the form of the statute, etc."

A conviction followed, and from the judgment on the verdict of the jury for the sum of $500, the company has appealed.

Its complaints are that the statute prohibiting extortion by railroad companies, and providing a penalty therefor, prescribes no standard as to what is just and reasonable for the guidance of the corporation, and altogether fails to define what it may and what it may not do; that it is, therefore, void for uncertainty; that, even if the statute is valid, the indictment states no facts showing the appellant guilty of the offense charged, but only the conclusion of the pleader that the rate charged was more than a just and reasonable compensation.

It is also urged that the trial court erred in refusing to grant to appellant a change of venue upon the testimony heard, and in the admission of incompetent evidence; and it further insists that, on the facts of the case, the charge is reasonable and just, within the meaning of the statute, and especially so as the charge is within the rate allowed by the company's charter.

The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in Sections 816 and 819 of the Kentucky Statutes. The first named section reads as follows:

> "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or the use of any railroad car upon its track, or upon any track it has control of or has the right to use in this State, it shall be guilty of extortion."

Section 819 fixes the *penalty for the first offense* at not less than $500, nor more than $1,000, and increases the penalty for subsequent infractions of the law. The circuit court of any county into or through which the road runs, and the Franklin circuit court, are given jurisdiction of the offense, the prosecution to be by indictment or action in the name of the Commonwealth, upon information filed by the board of railroad commissioners.

That this statute leaves uncertain what shall be deemed a "just and reasonable rate of toll or compensation" can not be denied, and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded.

The *criminality* of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws.

In Louisville & Nashville R. R. Co. v. Railroad Commission of Tennessee, 16 Am. and Eng. R. R. Cases, 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter):

> "Penalties can not be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the

penalty is inflicted must be defined by the law-making power. The legislature can not delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments, it must, in order to the validity of the law, define, with reasonable certainty, what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence can not know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of four per cent, while another might acquit an accused who had demanded and received at the rate of six per cent, rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms."

The Supreme Court of the United States, in Railroad Commission Cases, 116 U. S. 336, refers to this Tennessee case and substantially approves it by distinguishing the case then before the court from the Tennessee case.

This case is also used to support the text in 8 Am. and Eng. Ency. of L. 935, where it is said:

"Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable, in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates, this is a question which is a proper one for a jury."

Mr. Justice Brewer, in the case of Chicago, etc., R. R. Co. v. Dey, 35 Fed. Rep. 866, had under consideration the provisions of a statute similar to the one we have before us, and while the statute was upheld, it was only because there was a schedule of rates provided in the act which rendered the test of reasonableness definite and certain. The learned judge then said:

"Now the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate, it shall be deemed a criminal and punished by fine, and that such a statute is too indef-

> inite and uncertain, no man being able to tell in advance what in fact is or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

In Dwar. St. 652, it is laid down "that it is impossible to dissent from the doctrine of Lord Coke that acts of Parliament ought to be plainly and clearly and not cunningly and darkly penned, especially in legal matters." See also United States v. Sharp, Pet. C. C. 122; The Enterprise, 1 Paine, 34; Bish. St. Cr., Section 41; Lieb. Herm. 156.

And the learned judge concludes that there is very little difference between a provision of the Chinese Penal Code, which prescribed a penalty against any one who should be guilty of "improper conduct," and a statute which makes it a "criminal offense to charge more than a reasonable rate."

The same learned judge, discussing the kindred subject of unreasonable differences in rates, in Tozer v. United States, 52 Fed. Rep. 917, said:

> "But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

When we look to the other side of the question we find the contention of the State supported by neither reason nor authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury. It is in fact a question of contract. Common carriers are "bound to carry when called upon for that purpose, and charge only a reasonable compensation for the carriage. These are incidents of the occupation in which they are authorized to engage." (94 U. S. 180.)

If this charge is more than is reasonable, there is a violation of the contract, and the suit of the person aggrieved is because of such violation.

In some States the shipper is entitled to recover double or triple the amount of the excess, but this does not change the nature of the action.

The nearest approach to an authority for the State's contention is a case in which the shipper sued the carrier, and is reported in Railroad v. Jones, 149 Ill. 361. There the first section of the act under consideration, of which our statute is a substantial copy, was attacked for want of certainty in defining the act of extortion, the contention being that the determination of what is a fair and reasonable rate must depend upon a variety of considerations, such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability as affected by the value of the articles carried, the volume of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc.

The court said:

> "That the difficulties which stand in the way of determining what are reasonable rates also stand in the way of embodying in a legal enactment such an exact definition as is insisted upon. . . . The first section of the statute is merely declamatory of a well-known principle of the common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation upon receiving a reasonable hire (Messenger v. Penn. R. R. Co., 31 N. J. L. 407), and the court was to judge of the reasonableness of the freight charges. . . . Undoubtedly the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges (Dow v. Bridleman, 125 U. S. 680); but in the absence of statutory regulation upon the subject the courts must decide what is unreasonable."

As we have seen, the action was one by a shipper against the carrier, and was in the nature of a suit for damages for a breach of the contract. The court, however, made its meaning clear by references to and approving its former construction of the act as found in Railroad, etc., v. The People, 77 Ill. 443, and of that case said:

> "But we held in Railroad Co., etc., v. The People, that the first section of this statute should be construed in con-

nection with the eighth, and that the latter section, by providing for the making by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for each of the railroad corporations in the State, furnished a uniform rule for the guidance of the railroad companies. In that case we said: 'When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed.'"

As this Illinois section appears to have been substantially re-enacted here without, however, accompanying it with the provision for a standard, we quote the more freely from the Illinois court construing the section.

In the 77 Illinois case the court said:

"That section, by itself, makes the offense to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case, it may be seen, different persons would have different opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act which, in another place or at another time, would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be considered otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed. The statute furnishes evidence that it did not intend to leave the railroad in this state of uncertainty and danger, and exposed to such seeming injustice. . . . The eighth section provides how reasonable rates shall be ascertained; what they shall be; that the railroad and warehouse commissioners should make for each of the railroad corporations in the State a schedule of reasonable maximum rates, thus furnishing a uniform rule for the guidance of the railroad companies."

These authorities and the argument abundantly supporting them are sufficient. Other objections to the judgment below need not be discussed, as the one noted is fatal, and the statute can not be enforced as a penal statute.

It may be observed further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law.

The judgment is reversed, with directions to dismiss the indictment.

APPENDIX III.

Extracts from House Journal, 1900, Relative to the McChord Act.

Mr. Hickman moved that said bill, together with the amendments proposed thereto by the Committee on Railroads and Commerce, be taken up for consideration from the orders of the day.

Said motion was agreed to.

The yeas and nays being required thereon by Messrs. Catron and Jarnagin, were as follows, viz:

. . . . . 58 yeas.
. . . . . 40 nays.

Said bill reads as follows, viz:

(The bill as here copied is in the same language as the McChord Act as passed, and is set out in full in the foregoing brief.)

The amendments proposed thereto by the said committee were as follows, viz:

1. Amend Section 1, line 2, after the word "made," the words "in writing."

2. Amend Section 3 by adding, after the words "prosecutions under this act shall be indictment," the words "upon information filed before the grand jury by the Railroad Commission, or any member thereof, and the defendant shall be permitted upon trial to introduce proof to rebut the presumption of guilt raised by a violation of any order of the commission fixing a rate, toll or compensation."

3. To amend Section 2 by striking out after the word "officer," in line 7 thereof, the words, "agent or employe."

4. Amend Section 1, line 11, by inserting after the word "same" the words, "And shall hear and reduce, or cause to be reduced to writing, all evidence adduced by the parties, and such other evidence as they may desire to hear."

5. Amend Section 1 by striking out after the word "officer," in line 28 thereof, the words "agent or employe."

6. Amend Section 1 by inserting in line 18 thereof, after the word "rendered," the following words: "Provided, That said commission shall not by any rate, toll or compensation which it shall make and fix under this act, give to any railroad corpora-

tion an undue or unreasonable preference, or give any undue or unreasonable preference to any individual, company, firm or locality located on the line of any railroad doing business in this Commonwealth."

(House Journal, 1900, pages 530 to 534.)

The question was then taken on Amendment No. 1, above stated, and it was decided in the negative.

The yeas and nays being required thereon by Messrs. Klair and Jarnagin, were as follows, viz:

. . . . . 43 yeas.
. . . . . 55 nays.

The question was then taken on Amendment No. 2, as above named, and it was decided in the negative.

The yeas and nays being required thereon by Messrs. Klair and Orr, were as follows, viz:

. . . . . 45 yeas.
. . . . . 54 nays.

The question was then taken on amendments Nos. 3, 4, 5, and 6, as above named, and it was decided in the negative.

The yeas and nays being required thereon by Messrs. Slack and Heissman, were as follows, viz:

. . . . . 44 yeas.
. . . . . 55 nays.

Ordered that said bill be read the third time.

Said bill was read the third time by its title.

The constitutional provision as to the third reading of said bill at length being dispensed with.

The question was then taken on the passage of said bill, and it was decided in the affirmative.

The yeas and nays being taken on the passage of said bill in accordance with the provision of the Constitution, were as follows, viz:

. . . . . 56 yeas.
. . . . . 42 nays.

(House Journal, 1900, pp. 537 to 542.)

Nos 141 – 145
No. 396 & XAQO

Office Supreme Court U.S.
FILED
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JAMES H. McKENNEY,
Clerk.

Add'l Br. of Humphrey & Hines for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Nos. 396, 397, 398, 399 AND 400.

Filed Jan. 10, 1901.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLEE,

AND FOUR SIMILAR CASES.

ADDITIONAL BRIEF FOR APPELLEES.

A. P. HUMPHREY,
WALKER D. HINES,
For Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES C. McCHORD ET AL., *Appellants*,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellee*.

AND FOUR OTHER CASES.

Nos. 396 to 400.

ADDITIONAL BRIEF FOR APPELLEES.

JURISDICTION.

1. These suits are based upon the theory that the McChord Act is as a whole unconstitutional.

2. Since by the McChord Act the Railroad Commissioners are charged with the special duty of carrying out its provisions to the extent of making rates, such suits against those Commissioners are not suits against the State.

3. If the McChord Act is unconstitutional and the action of the Commissioners under it would result in multiplicity of actions and prosecutions against the railroad companies, a Court of Equity has jurisdiction to enjoin the Commissioners from proceeding under the Act.

4. If the Act is unconstitutional by reason of its conflict with the Constitution of the United States, then the Courts of the United States have original jurisdiction of such suits, and the railroad companies have the right to ask those Courts to extend to them the protection afforded by the Constitution of the United States.

UNCONSTITUTIONALITY OF THE McCHORD ACT.

I.

Appellants' counsel lay stress on the statement that if an opportunity be afforded to a railroad company to question the reasonableness of a rate fixed by the Legislature or the Railroad Commission, before the failure to observe that rate becomes a crime, the railroad company is thus afforded a sort of "interregnum," which is denied to other citizens in the enactment of ordinary penal statutes. In this contention counsel lose sight of the distinction between a legislative act or an order of a railroad commission fixing a rate and an ordinary statute defining an offence and prescribing penalties. In the latter case there can be no question of discretion or reasonableness upon which the courts can pass, for the discretion rests solely with the Legislature. But when it comes to fixing the compensation which shall be made to a railroad company for the service afforded by it to the public, the courts then have a right to inquire into the reasonableness of that compensation. Certainly a railroad company has the right to be compensated for the services rendered by it to the public. The Legislature cannot require the railroad company to render such service free of charge. It can within constitutional limits regulate the amount of such compensation. At last it comes to the ownership by the railroad company of its property and the right to secure compensation for its use on the one hand, and a right by the Legislature to exercise a certain measure of control over the property of the railroad company to the extent of fixing the compensation which the public must pay in order to be entitled to use such property. Now surely there is a wide difference between that

sort of legislation under which are enacted laws fixing the rates to be paid by the public for the use of the railroad company's property and those laws by which the Legislature simply defines what shall be considered public offences, punishable by appropriate penalties, such as fine and imprisonment. In the one case the owner of the property is justly entitled to have the question of the proper limits of his ownership on the one side and the State's control on the other determined before some judicial tribunal, and is justly entitled to have this determination without being subjected to the hazard of incurring penalties which will destroy his interest in his property.

We admit that if, after there has been this opportunity of judicial inquiry, and it has been determined that the control asserted by the Legislature is within just limits, that it may properly visit the railroad company with appropriate penalties for further refusal to obey the legislative mandate. The legislative power of enforcing its will is then just as plenary as in other cases of violation of penal laws.

II.

It is clear and it is conceded by appellants' counsel that upon the trial of the indictment the determination of the reasonableness of the Commission's rate, if that question can be then inquired into, is wholly for the jury. Section 353 of the Criminal Code of Practice of Kentucky dealing with the subject of appeals in misdemeanor cases is as follows :

> "The judgment shall be reversed for any error
> "of law appearing on the record when, upon con-
> "sideration of the whole case, the Court is satisfied
> "that the substantial rights of the defendant have
> "been prejudiced thereby."

It is settled by the decisions of the Court of Appeals

of Kentucky that if there be any evidence to sustain a judgment of conviction that judgment will not be reversed on the ground that it is against the evidence.

86 Ky., 315; 92 Ky., 612.

The hopelessness of submitting a question of this character to the jury, and permitting it to go at large into an investigation of the history and financial condition of a railroad company, the nature and extent of its revenue and expenses, and the propriety of all the elements of each is such that the question has never to our knowledge been actually submitted to a jury even in a civil case, although it is a common law principle that there may be recovered from a carrier any excess charged by him over a just and reasonable rate.

In *Hutchinson on Carriers* (2d ed.), Section 447, it is indicated that if in any such action for any excess charge over a reasonable rate, a rate for that particular service has been established by usage, that rate must control, and it is clear that any other rule would lead to the utmost confusion.

The impossibility of submitting a question of this character to a jury has been pointed out in *Louisville and Nashville Railroad Company* v. *Railroad C mmission of Tennessee*, 19 Fed. Rep., 679. The Court discussed this general question with reference to a statute making it a criminal offence to charge more than a just and reasonable rate. After pointing out that the Act recognized the railroad company's right to a fair return on the value of the railroad as assessed for taxation, the Court said:

> "Suppose the value satisfactorily ascertained, "how and upon what basis are the net earnings to "be computed? Is the estimate to be based upon "past receipts, current income or anticipated earn- "ings? Is the accused corporation to be held to

"anticipate its future operations, foresee the "amount of its receipts and expenditures, and ac- "curately foreknow its future profit and losses, so "as to be able to strike a balance in advance of "actual results in order to make its charges con- "form to the requirements of the statute? If so, "how far into the future must their knowledge "extend? These are some of the many difficulties "with which railroad companies are to be em- "barrassed, and against which the Act requires "them to provide. But we will suppose these to "have been successfully surmounted, and another "and more obstinate problem remains. These cor- "porations are, in addition to their expenses, "allowed to charge at a rate that will insure a "'fair and just return' on the value of their prop- "erty. But what is a fair and just return? This "vital question is by the Act left to the unquali- "fied and unrestrained discretion of the jury. "There is no legal standard erected whereby the "jury can measure the amount. One jury may fix "it at two or three per cent per annum, while "another jury may, in view of business contingen- "cies and fluctuating values, allow 6, 8 or 10 per "cent, and their action would be so far conclusive "as to be beyond the revision of any reviewing "court. The facts that the jury are to determine "are, first, the net earnings; and secondly, what "would be a fair and just return? The ascertain- "ment of net earnings involves necessarily an "inquiry into the gross receipts and expenditures. "May the jury revise the expense account, and if "so, to what extent? Both the earnings and ex- "penses vary in accordance with the exigencies of "business. Are rates to be varied in accordance "with the fluctuating fortunes of railroad opera- "tions? If so, a charge reasonable in itself and "honestly made might be rendered extortionate, "and hence criminal, by a reduction of expenses "or an unexpected increase of busines, or a charge "honestly made on the supposition that 5 or 6 per "cent would be fair and just, might be converted

"into a crime by the verdict of a jury subse-
"quently rendered, based, it may be, upon facts
"transpiring subsequent to the alleged violation of
"the law."

In *Winsor Coal Company* v. *Chicago & A. R. Co.*, 52 Fed. Rep., 716, the Court pointed out that the Legislature had established maximum rates, and had provided for the further fixing of rates by the Railroad Commission, and held that an action could not be maintained for the excess over a just and reasonable rate when the rate charged did not exceed the rate fixed by the statute or by the Commission, and said:

"What in the judgment of one jury n one lo-
"cality would be an unreasonable charge might in
"the opinion of another jury in another locality be
"quite reasonable. With the known capricious-
"ness of jury verdicts, influenced often by indi-
"vidual peculiarities, mental habits, the quantum
"and quality of the evidence in the particular case,
"how would it be possible to carry out the legis-
"lative intent to establish and maintain a uniform
"rate of charges? Would not the diversity of
"conclusions reached by different juries between
"different litigants in and of itself bring about
"discrimination and inequality? Under such a
"construction of this statute as contended for by
"plaintiff it is not apparent how any railroad com-
"pany could safely do business in the State. Its
"agents could never know when they were safe in
"any charge by them made. After a schedule of
"rates has been approved and published, the statute
"makes it unlawful for the carrier to charge less
"than the scheduled rate, under the pains and pen-
"alties prescribed in the act; and yet, under plain-
"tiff's theory the common carrier might be liable
"for the penalty of triple damages because it did
"not charge a lesser rate."

In *Van Patten* v. *Chicago &c., Railway Co.*, 81 Fed. Rep., 545, the Court held that a shipper could not main-

tain an action against a carrier for charging an unjust and unreasonable rate when the carrier had charged only the schedule rate published and filed in accordance with the Interstate Commere Act, and said that if such an action could be maintained,

> "It results in the holding that it was the intent "of Congress to place upon the courts and juries "of the country the duty and burden of establish- "ing the rates of transportation for interstate com- "merce and upon the common carrier the burden "of transportation, with the right to ultimately "retain as pay therefor the rate fixed by the ver- "dict of a jury rendered perhaps five years after "the rendition of the services. How is it possible "for a jury to pass understandingly upon the ques- "tions which inhere in the establishment of a "properly proportioned and equalized schedule of "transportation rates? Take this case as an ex- "ample. As already stated the petition contains "23 counts, each count being based upon shipments "made from a different point and at each point "the shipments were made at many different times "within the limits of from one to five years. Now "the theory of the plaintiff is that the jury must "inquire into and determine what the reasonable "rate was for each shipment when made, and by "comparing the reasonable rate thus fixed by "the jury with that actually charged, determine "whether the plaintiff is entitled to damages, and "if so to ascertain the amount on each shipment "made. It is self-apparent that no matter how "intelligent the jury might be. nor how conscien- "tiously and carefully they might endeavor to "deal with the problems thus submitted to them, "it would be wholly impossible for them to reach "a proper verdict under such circumstances. But "suppose the case involved but a single shipment, "would the difficulty be remedied if the theory of "the plaintiff is to prevail? How could the jury "fairly and understandingly deal even with the

"case of a single shipment, provided the duty is "placed upon the jury of determining what a fair "and reasonable charge for the particular service "would be, unless some standard already recog- "nized and established is given them for their guid- "ance? It is impossible for the jury to deal with "the questions of the total cost of building, equip- "ping and operating the line of railway as a whole, "the proportionate cost of the particular transpor- "tation in question, the total amount of business "done over the entire system, the total burden "properly to be laid upon the total business for "transportation charges and the proper propor- "tionate share which the particular shipment "should bear."

It must be obvious that it is utterly impracticable, as well as unjust, to submit a question of this character to a jury, even in a civil action, much less in a criminal prosecution where the most enormous penalties are involved.

It was suggested in argument that after the Commission had fixed a rate and notified the railroad company of such rate that it might still be revoked or modified by an order of the Commission likewise entered of record, and that there was open to the railroad company the remedy of mandamus to compel the Commission to so revoke or modify. Mandamus is treated of in Sections 474–479 of the Kentucky Code of Practice. It is the settled law of Kentucky that wherever a ministerial officer has imposed upon him a duty involving judgment and discretion he cannot be controlled in that duty by mandamus. While he may be compelled to act, the Court cannot say how he shall act. The whole subject is fully gone into in the case of *Booe, County Judge*, v. *Kenner*, 49 Southwestern Reporter, 330, where all Kentucky cases are collected. Among other quotations made in that opinion is the following:

"In Dickens *v.* Cemetery Company, 93 Ky., 389, the Court said: 'It is well settled by this Court (see Cassidy *v.* Young, 92 Ky., 227), that to entitle a party to this writ the officer's duty must be strictly ministerial. But, if he may act in the premises according to his judgment and discretion, then mandamus will not lie to control his judgment and discretion, even though that judgment and discretion are at variance with what is clearly right or dutiful in the premises.'"

The Court continuing, says:

"Innumerable other similar quotations may be made."

If, therefore, the Commission has fixed a rate, and entered the same of record, and notified the railroad company that if the railroad company was to apply for a mandamus, the answer of the Commission would simply be that it had already exercised its discretion in reference to the given rate and that would be the end of the cause.

That the Legislature never contemplated any such procedure under the McChord Act is further evident from the fact that only the short space of ten days intervenes between the mailing of a letter to any officer or employe of the railroad company and the time when it becomes a crime for the railroad company to exceed the rate fixed. That time is hardly sufficient for the company to issue and place in the hands of its agents for their guidance a new tariff, and wholly insufficient for the railroad company in addition to investigate its legal status, have mandamus proceedings framed and instituted, proper process served on the railroad commissioners, the necessary order from the Court, and to secure thereunder the reassembling of the Commissioners and the revocation of the rates in question; and unless

a revocation is actually made and entered within the ten days the rate becomes the law and it becomes a crime on the part of the railroad company to exceed it.

III.

If the McChord Act be held constitutional then it results that the Legislature may establish a scheme whereby rates may be fixed which are conclusive upon the railroad company for all practical purposes and exclude that judicial inquiry to which the railroad company is entitled under the Federal Constitution.

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For Appellees.

No. 141 L. 145 S.
Cost's Bf. of Mem. [illegible]
for Appellees.
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Supreme Court of the United States.

OCTOBER TERM, 1901.

Nos. 141, 142, 143, 144, and 145.

CHARLES C. McCHORD ET AL., APPELLANTS,

vs.

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AND FOUR SIMILAR CASES.

SECOND ADDITIONAL BRIEF FOR APPELLEES.

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SECOND ADDITIONAL BRIEF FOR APPELLEES.

I. There has been a gradual development of the doctrine as to the extent to which common carriers and other public-service corporations may have judicial protection against rates fixed by legislatures or under their authority.

In Munn *vs.* Illinois, 94 U. S., 113, and especially in Peik *vs.* Chicago, &c., R. Co., 94 U. S., 164, this court announced that there was no appeal to the courts from rates fixed by the legislature or under its authority. In Spring Valley Co. *vs.* Schottler, 110 U. S., 347, the court suggested that this might be an open question. In the Railroad Commission

cases, 116 U. S., 307, the court distinctly announced that the legislative power was not without limit. In Chicago, &c., R. Co. *vs.* Minnesota, 134 U. S., 418, the court made its first direct application of the principle that a railroad company was entitled to have judicial inquiry as to the reasonableness of rates fixed by a railroad commission. In Budd *vs.* New York, 143 U. S., 517, the court indicated that while a statute delegating to a railroad commission the power to fix rates might be required to provide or permit an opportunity for judicial settlement of the charges, yet the same rule did not apply when the rates were fixed by the legislature. In Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S., 362, this court for the first time actually set aside a body of rates prescribed by a railroad commission of a State, on the ground that they were unreasonably low. In Covington & Lexington Turnpike Road Co. *vs.* Sandford, 164 U. S., 578, this court for the first time held that rates fixed directly by the legislature must be set aside if confiscatory in character. In Smyth *vs.* Ames, 169 U. S., 466, this court, after reviewing all its decisions on the subject, unanimously announced that the question as to whether rates for the transportation of persons or property are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures could not be so conclusively determined by the legislature of the State or by regulations adopted under its authority that the matter might not become subject to judicial inquiry. In C., M., &c., R'y *vs.* Tompkins, 176 U. S., 167, this court announced that the proposition that the owners of railroad property might be deprived of it by the arbitrary enactment of any legislature,

State or national, fixing rates unreasonably low, without any right of appeal to the courts, was one that could not be for a moment tolerated.

In view of the doctrine thus firmly established by this court, it is submitted that legislative enactments, or regulations under legislative authority, attempting to prescribe the measure of compensation which may be enjoyed by common carriers and other public-service corporations, involving, as they necessarily do, the question of what is a reasonable compensation for the use of property thus taken for public service, occupy a distinct class; they are *sui generis;* and the legislature in prescribing methods for their enforcement must necessarily be subject to restrictions to which it is not subject in enactments under the police power which simply prohibit or regulate the use of one man's property in the interest of the public welfare, but which do not go to the extent of actually subjecting that property to the use of others for compensation prescribed by or under those enactments.

II. We contend that when rates are prescribed by or under legislative authority it is unconstitutional to enforce them, in the first instance, by an unrestricted system of prosecutions in which heavy penalities can be imposed upon the carrier. Under such a system the carrier cannot restrain the institution of prosecutions. These penalties will necessarily accumulate in such a way as to compel the carrier to acquiesce in the rates fixed. It cannot take the risk of succeeding in demonstrating in the prosecutions, if such inquiry be allowed there, that the rates are unreasonably low. The case of Fitts *vs.* McGhee, 172 U. S., 516, shows that

under such a system the carrier cannot avoid a great multiplicity of prosecutions and the consequent imposition of penalties aggregating in amount probably the value of its property.

The question as to the constitutionality of such penalties has not been passed upon by this court. It was distinctly reserved in the case of Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S., 362, the court holding that the Texas act was a comprehensive act of regulation which would stand even if the penalties were disregarded.

The cases of Chicago, &c., R. Co. *vs.* Wellman, 143 U. S., 339; Budd *vs.* New York, 143 U. S., 517, and St. Louis, &c., R. Co. *vs.* Gill, 156 U. S., 649, are not, as contended by appellants' counsel, authorities upholding the constitutionality of penalties of this description. The point was not presented or considered in any of those cases. When the Wellman and Budd cases were decided the court distinctly reserved the question as to whether it could declare unreasonable any rate fixed directly by the legislature, and, of course, could not be presumed to be passing upon the further question as to whether, if it had the power to set such rates aside, it would be constitutional to enforce such rates by an unrestricted scheme of penalties. In the Gill case, likewise, the court withheld any distinct declaration that it had the power to declare rates fixed by the legislature unreasonable. In both the Wellman and Gill cases, and also in the case of Dow *vs.* Beidelman, 125 U. S., 680, the court emphasized the difficulty of considering such a question in a penal action instituted by a private citizen, and, of course, the same difficulty would exist in a prosecution instituted by a grand jury or a purely local prosecuting

officer. Moreover, if there were any expressions in the Gill case which might look in the direction of upholding as constitutional an unrestricted scheme of penalties, they must be regarded as modified by the subsequent holding of this court in the case of Smyth *vs.* Ames, 169 U. S., 466.

The case of Fitts *vs.* McGhee, 172 U. S., 516, does not, as appellants' counsel contend, hold that such penalties are constitutional, because in that case the court did not attempt to pass upon the merits of the statute, but simply held that it had no jurisdiction because it was a suit against the State.

In Chicago, &c., R. Co. *vs.* Minnesota, 134 U. S., 418, and in St. Louis, &c., R. Co. *vs.* Gill, 156 U. S., 649, this court seemed to recognize the propriety, if not the necessity, for some general and conclusive method of determining the reasonableness of rates, wherein the State might be adequately represented. In the case of Smyth *vs.* Ames, 169 U. S., 466, the court, in upholding the jurisdiction of a court of equity in such a case, emphatically demonstrated the absolute necessity, from the standpoint of the railroad company, for some proceeding of that nature, if it were to have any judicial protection whatever. In that case the court said:

"Under the principles which in the Federal system distin-
"guish cases in law from those in equity, the circuit court of
"the United States, sitting in equity, can make a comprehen-
"sive decree covering the whole ground of controversy, and
"thus avoid the multiplicity of suits that would inevitably
"arise under the statute. The carrier is made liable not
"only to individual persons for every act, matter or thing
"prohibited by the statute, and for every omission to do any
"act, matter or thing prescribed by the statute, but to a fine

"of from one thousand to five thousand dollars for the first "offense, from five thousand to ten thousand dollars for the "second offense, from ten thousand to twenty thousand dollars "for the third offense, and twenty-five thousand dollars for "every subsequent offense. The transactions along the line of "any one of these railroads, out of which causes of action might "arise under the statute, are so numerous and varied that "the interference of equity could well be justified upon the "ground that a general decree, according to the prayer of "the bills, would avoid a multiplicity of suits, and give a "remedy more certain and efficacious than could be given "in any proceeding instituted against the company in a court "of law; for a court of law could only deal with each sepa-"rate transaction involving the rates to be charged for trans-"portation. The transactions of a single week would expose "any company questioning the validity of the statute to a "vast number of suits by shippers, to say nothing of the "heavy penalties named in the statute. Only a court of "equity is competent to meet such an emergency and de-"termine once for all and without multiplicity of suits, mat-"ters that affect not only individuals but the interests of the "entire community as involved in the use of a public high-"way and in the administration of the affairs of the quasi-"public corporation by which such highway is maintained."

If the Nebraska statute had been framed as was the Alabama statute involved in Fitts *vs.* McGhee, so that suit for injunction could not have been maintained, it is obvious that the Nebraska companies would have had no substantial opportunity to seek judicial protection, but would have been compelled on account of the heavy fines imposed to observe the rates fixed by the Nebraska legislature. They would, for practical purposes, have been denied the judicial protection to which the court said they were entitled.

Under the operation of the scheme of unrestricted penalties prescribed by the McChord act, the railroad company would either have to acquiesce entirely in the rates fixed by the commission or disregard them in all instances. If it did the former, it would necessarily be deprived of the judicial protection to which it is entitled. If it did the latter, it would encounter the menace of penalties as above explained. The railroad company could not, in order to make a test case, follow a middle course of charging its own rates in some instances and the commission's rates in other instances until a final decision could be reached, because (1) this could only be done on agreement with the prosecuting officers of the State; (2) it would still involve the company's being forced to carry the bulk of its traffic at the unreasonably low rate, and (3) under section 215 of the constitution, the company is bound to charge the same rate to all for the same service, under penalties varying from $2,000, for the first offense, to forfeiture of its charter for the third offense, according to section 217 of the constitution. Sections 215 and 217 of the constitution read as follows:

"215. All railway, transfer, belt lines or railway bridge "companies shall receive, load, unload, transport, haul, de- "liver and handle freight of the same class for all persons, "associations or corporations, from and to the same points "and upon the same conditions, in the same manner and for "the same charges, and for the same method of payment."

"217. Any person, association or corporation, willfully or "knowingly violating any of the provisions of sections 213, "214, 215 or 216, shall, upon conviction by a court of com- "petent jurisdiction, for the first offense be fined two thou- "sand dollars; for the second offense, five thousand dollars;

"and for the third offense, shall thereupon, '*ipso facto*,' for-
"feit its franchise, privileges or charter rights; and if such
"delinquent be a foreign corporation, it shall '*ipso facto*'
"forfeit its right to do business in this State; and the at-
"torney general of the Commonwealth shall forthwith, upon
"notice of the violation of any of said provisions, institute
"proceedings to enforce the provisions of the aforesaid
"sections."

III. In Bronson *vs.* Kinsey, 1st Howard, 311, this court considered whether a State law passed subsequently to the execution of a mortgage, relating to the remedy for enforcing the mortgage, amounted to an impairment of the obligation of the mortgage. The court said:

"It is difficult, perhaps, to draw a line that would be ap-
"plicable in all cases between legitimate alterations of the
"remedy and provisions which, in the form of remedy,
"impair the right. But it is manifest that the obligation of
"the contract and the rights of a party under it may, in
"effect, be destroyed by denying a remedy altogether; or
"may be seriously impaired by burdening the proceedings
"with new conditions and restrictions, so as to make the
"remedy hardly worth pursuing. And no one, we pre-
"sume, would say that there is any substantial difference
"between a retrospective law declaring a particular contract
"or class of contracts to be abrogated and void and one
"which took away all remedy to enforce them or encum-
"bered it with conditions that rendered it useless or imprac-
"ticable to pursue it."

In speaking further of the function of the remedy, the court said:

"It is the part of the municipal law which protects the
"right, and the obligation by which it enforces and main-

"tains it. It is this protection which the clause of the Con-
"stitution now in question mainly intended to secure.
"And it would be unjust to the memory of the distinguished
"men who framed it, to suppose that it was designed to pro-
"tect a mere barren and abstract right, without any practi-
"cal operation upon the business of life."

We conceive the question now before the court is the question whether the right of public-service corporations to protection against unreasonably low rates fixed by the legislature or under its authority may, at the pleasure of the legislature, be seriously impaired by burdening the remedy with conditions and restrictions so as to make the remedy not worth pursuing, and so as to reduce the supposed right to a "mere barren and abstract right, without any practical operation upon the business of life."

We do not believe that the court can uphold the McChord act without holding that the legislature is absolutely free from any restriction in the choice of methods to enforce the rates prescribed by it or under its authority. To say that the legislature is so unrestricted is to say that the rights secured by the Constitution of the United States may be constitutionally destroyed by a practical destruction of every practicable remedy.

IV. Appellants' counsel now contend in oral argument that under the McChord act, and other statutes of Kentucky, the railroad commission has the exclusive power of inaugurating these prosecutions, and that therefore these prosecutions can be controlled by enjoining the commission from inaugurating them. Appellants' counsel insisted in their original brief that the railroad commission had no duty or

authority whatever with respect to instituting these prosecutions, and in fact that the commission had no connection whatever with the enforcement of the rates they might fix. In their last supplemental brief they contend that the commission "probably" has the right to recommend indictments, but do not contend that this power is exclusive. In oral argument they went beyond this, and now claim that the commission has the exclusive power, by virtue of section 819, Kentucky statutes, and say this power is further confirmed by the case of the Illinois Central R. Co. *vs.* Commonwealth, decided by the court of appeals on October 25, 1901, and printed as an appendix to this brief.

It is, of course, immaterial whether the commission has the right to recommend indictments or not, unless that right is exclusive, for even though the commission may have the right to recommend such indictments, still if indictments can be found at the will of grand juries, without such recommendation from the commission, an injunction against the commission would be without effect in restraining prosecutions. There seems to be no warrant for the contention that section 819 of the Kentucky statutes is part of the McChord act, so as to prevent indictments except upon recommendation of the commission. The title of the McChord act shows that that act was designed to prescribe the manner of enforcing its provisions. That the legislature did not contemplate that section 819 of the Kentucky statutes would be regarded as part of the McChord act is clear, because the McChord act proceeded to declare the courts which would have jurisdiction of the offenses and the limitation for the prosecutions, although both of these points had been regulated by section 819 of the Kentucky statutes. We sub-

mit that this court cannot read into the McChord act, which is obviously a complete system of regulation in itself, the provision that indictments under that act can be found only upon recommendation of the railroad commission, when the legislature not only did not insert that provision in the act but expressly refused to do so. Nor can it assume that the court of appeals of Kentucky will insert such a qualification into the McChord act. The case of the Illinois Central R. Co. *vs.* Commonwealth, above referred to, instead of indicating that the court of appeals of Kentucky would read this provision into the McChord act, indicates the contrary. It will be observed that the court held in that case that under section 820 of the Kentucky statutes (long and short haul section) indictments could be found only after the railroad commission had refused to exonerate, because that section expressly provided for complaint to the commission, and that the commission should file its order refusing to exonerate in order that the company might be indicted. The opinion plainly shows that if such a provision had not been in that section the court would not have held that there was an exclusive power of initiating prosecutions in the railroad commission, simply because of section 819 and section 821 of the Kentucky statutes.

In support of their contention that section 819 of the Kentucky statutes gives the railroad commission the sole and exclusive right to inaugurate prosecutions under the McChord act appellants' counsel relied with especial emphasis upon Southern Pacific Company *vs.* Board of Railroad Commissioners, 78 Fed. Rep., 236. In that case the very section of the constitution which empowered the commission to fix rates made it the duty of the commission to

enforce their decisions and correct abuses through the medium of the courts. The court simply held that the proper interpretation of the words "enforce their decisions and correct abuses through the medium of the courts" embraced their orders with regard to rates, pointing out that, according to the ordinary rules of construction, any narrower interpretation of the words in question would be obviously improper. The court did not undertake to import the railroad commission into the section in the matter of enforcing their rates. The duty of enforcement resting upon the commission was already expressly in the section, and the court simply construed that already existing duty in the proper way. In the case at bar the appellants' counsel ask this court to import into the McChord act the exclusive duty of enforcement upon the commission, when the act itself imposes no duty whatever upon the commission with respect to the enforcement of its rates, but, on the contrary, clearly indicates that it was intended as a complete method of enforcement, without reference to any other statute.

We submit, therefore, that the case of Southern Pacific Company *vs.* Board of Railroad Commissioners, 78 Fed. Rep., 236, is no authority for appellants' contention, but is necessarily distinguishable from the case at bar, as was pointed out by appellants' counsel in their original brief, in the following language:

"In that case, however, the statute expressly delegated to "the railroad commissioners the power and duty not only "of making and changing the rate and revising it, from "time to time, but also the right, power and duty of enforc- "ing their own orders and decisions, both directly, as far as

"power was conferred, and, in addition thereto, through the "medium of the courts" (pp. 35, 36).

V. We conceive that the contention of appellants' counsel that upon trial of an indictment for failing to charge a rate fixed by the railroad commission, the question as to the reasonableness of that rate would be a question of law for the court and not a question of fact for the jury, is a contention immaterial in this case. Even if it be a question of law for the court, it still remains that the railroad company would be deterred from seeking this method of judicial investigation because of the tremendous forfeit which would be at stake; and it would be subject to the entirely distinct objection that if the penalty were imposed upon such a trial, it would be imposed because the carrier had committed an act and thereafter the court had disagreed with the carrier upon the reasonableness of the elements surrounding that act (L. & N. R. Co. *vs.* Commonwealth, 99 Ky., 132). It may be added, however, that this court in the Wellman case, 143 U.S., 339, plainly indicated that this was a question of fact for a jury and not of law for the court.

VI. In Wisconsin, &c., R. Co. *vs.* Jacobson, 179 U.S., 287, the court said:

"A statute, or regulation provided for therein, is frequently "valid, or the reverse, according as the fact may be, whether "it is a reasonable or unreasonable exercise of legislative "power over the subject-matter involved. And in many "cases questions of degree are the controlling ones by which "to determine the validity, or the reverse, of legislative "action."

Unless the court holds that the legislature is entirely without restriction in prescribing the methods of enforcing rates which it declares to be the compensation which public-service corporations shall receive for the use of their property in the public service, we respectfully submit that, aside from the specific objections already urged against the McChord act, it is on its face such an essentially unreasonable method of enforcing rates as that it ought on that account to be condemned.

VII. Upon the question of jurisdiction we submit:

1. These suits were based upon the theory that the McChord act is, as a whole, unconstitutional.

2. Since by the McChord act the railroad commissioners are charged with the special duty of carrying out its provisions to the extent of making rates, such suits against these commissioners are not suits against the State.

3. If the McChord act is unconstitutional and the commissioners therefore have no right to take any steps under that act, it cannot be interference, either with legislative discretion or with the lawful discretion of the commission, to restrain the commission from proceeding to carry out this unconstitutional act. In every case cited by appellants' counsel where the court has refused to enjoin action by the commission, the court so held because it held that the law under which the commission was acting was not unconstitutional and void.

4. If the act is unconstitutional and the commission consequently has no power to interfere with the rates of the railroad companies, it is necessarily a wrong for the commission to interfere at all with the rates of the railroad companies under that act. The commission admits that it proposes to interfere with those rates under that act. This threatened wrong would be irreparable and the railroad companies would have no adequate remedy at law. To say that they would have adequate remedy at law is simply to deny that the act is unconstitutional for the reasons assigned by us. The multiplicity of prosecutions which would inevitably result is, moreover, of itself sufficient ground for interference of equity.

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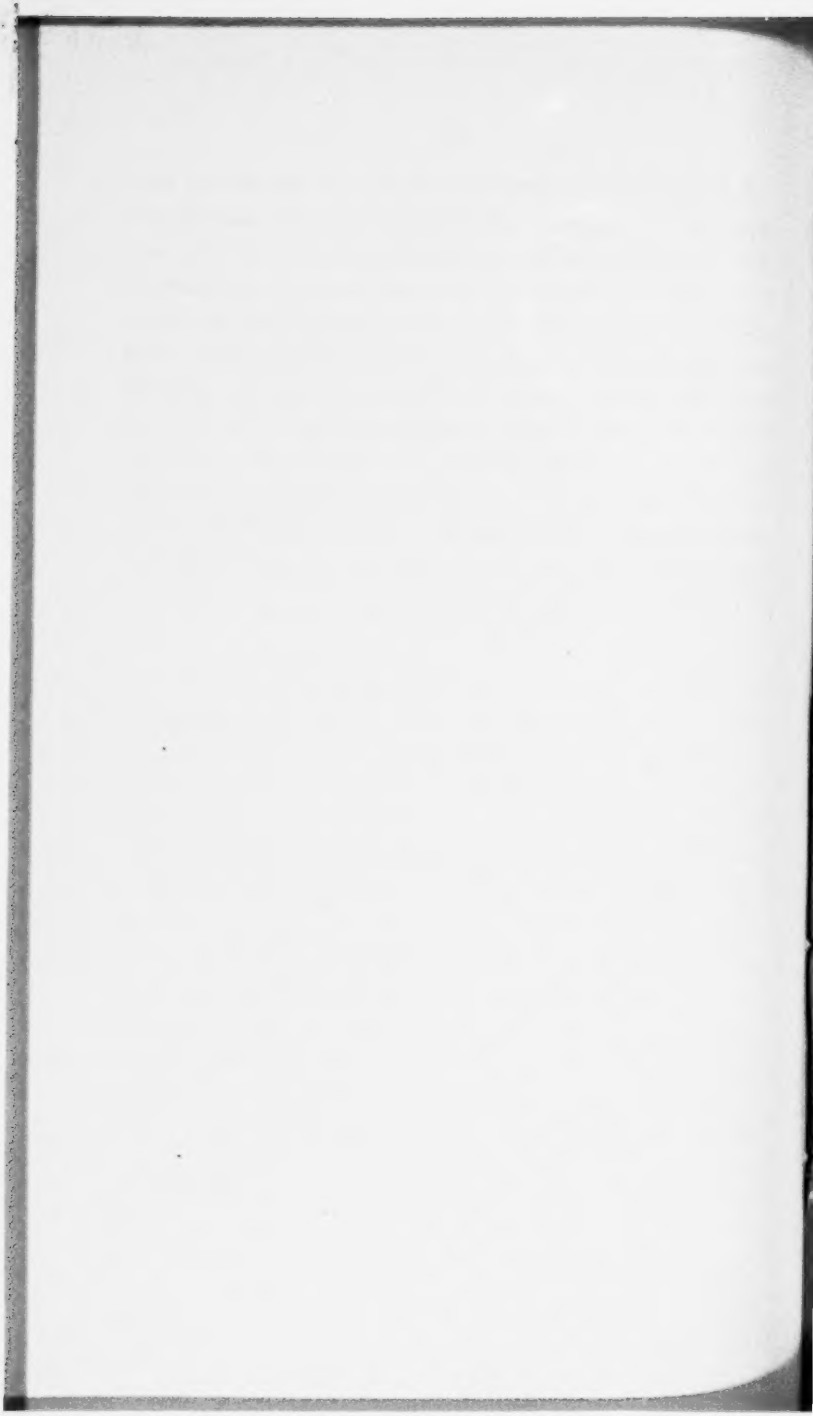
For Appellees.



APPENDIX.

KENTUCKY COURT OF APPEALS, OCTOBER 25, 1901.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
COMMONWEALTH OF KENTUCKY, *Appellee*.

Appeal from the Hardin circuit court.

Opinion of the Court by Judge Hobson.

Appellant was indicted in the Hardin circuit court, and fined $200.00 for charging more for hauling a car-load of coal from Deanfield, Kentucky, to Stevensburg, Kentucky, than from Deanfield through Stevensburg to Louisville. The indictment was returned June 10, 1899. At that time the railroad commission had not determined whether appellant should be exonerated as provided by the statute. The first question to be determined on the appeal is whether under the statute the carrier may be indicted by the grand jury before the railroad commission has refused to exonerate it. The statute is in these words (Kentucky Statutes, sec. 820):

"If any person owning or operating a railroad in this State or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit court

of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission, and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

In the construction of statutes the cardinal aim of the court is to arrive at the intention of the legislature. The court will presume that the legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the legislature had intended indictments to be found for each offense, regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence defining the offense and providing for its punishment, for by the next section (Kentucky Statutes, sec. 821) it is made the duty of the commission:

"To see that the laws relating to all railroads, except street, are faithfully executed;" and under this provision it would be the duty of the commission to see to violations of the preceding section. Not only so, but it is provided in section 820 that if the commission deems it proper to exonerate a carrier from the operation of its provisions an order to that effect shall be made, and after such order the carrier shall not be prosecuted for that matter. To indict the carrier in the first place without action by the railroad commission would be to deprive it of all benefit of this provision. If the commission had only power to pass on the same facts as the grand jury, it might, perhaps, be maintained that the legislature intended to provide a cumulative remedy and that a preliminary hearing before the commission was not essential. But such is not the fact. The statute is made pursuant to the following provision of the constitution (section 218):

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission, such common carrier or person, or corporation owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section."

In construing this provision in L. & N. R. R. Co. *vs.* Commonwealth, 20 R., 1380, it was held that the circumstances or conditions exempting the railroad altogether from the operation of the section did not include competition with other lines; and in the subsequent case of L. & N. Railroad Co. *vs.* Commonwealth, 21 R., 232, this ruling was adhered to; and it was further held that in such cases the power was vested in the railroad commission to exonerate the carrier. We said:

"It is urged that this construction of the constitution will allow coal and other freight from without the State to be shipped cheaper than they can be hauled to the same point if shipped within the State, as under the interstate commerce act competition is held to exclude the carrier from the long and short haul clause. The constitutional convention, no doubt, had just such considerations in mind when it gave the railroad commission the plenary powers conferred on it as above explained. It is the duty and, no doubt, will be the pleasure of the railroad commission to so regulate the matter that no injustice shall be done any industry in the State, and the true interests of the Commonwealth as a whole be promoted."

It will be observed that the constitutional convention did not adopt a hard and fast rule making the charge of more for the short than for the long haul unlawful, but expressly empowered the commission to authorize the railroad to charge less for longer than for shorter distances, and to prescribe from time to time the extent to which the carriers might be relieved from the operation of the section. There were many industries in the State whose interests required this. More than one coal famine had occurred. The only security against a recurrence of this trouble was our domestic coal; but this could not be available unless given lower rates, so that it could compete in the market with coal shipped by water. If it could not thus compete, it could not be relied on as a supply in an emergency. The low rate in this case was given on coal shipped to Louisville,

because it there came in competition with the coal brought down the Ohio river. The railroad commission was the only tribunal authorized to relieve appellant from the operation of the section. No such power was vested in the courts. The question of competition could not be examined there, nor could it be shown that a proper case existed for exoneration from the section. The legislature, therefore, provided for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not, and, therefore, it was provided that if the commission relieved the carrier from the operation of the section no prosecution should be had on account of the matter complained of. It also further provided that if the commission failed to exonerate the carrier it should make an order in writing to that effect and furnish "a statement of the facts, together with a copy of its order to the grand jury of any county the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense." The requirement that the commission should furnish the grand jury a copy of its order *in order that* the railroad company might be indicted for the offense must be read in connection with the previous clause, that if the company was exonerated the railroad company should not be prosecuted. The plain meaning of the two together is that the railroad company may be indicted for the offense if not exonerated, and may not be indicted if it is exonerated, and the copy of the order of the commission refusing to exonerate it is required to be furnished to the grand jury *in order* that the company may be indicted.

From the section as a whole it is clear that the legislature had in mind providing for the exoneration of the railroad from its provisions in proper cases and exempting the carrier from criminal liability to this extent. It therefore provided for an investigation by the railroad commission, a determination by it whether it deemed it proper to exonerate the

railroad and for the enforcement of its decision by indictment by the grand jury in case the railroad was not exonerated. To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The legislature had no such result in mind, but clearly aimed to secure to the carrier a hearing on this question.

The long and short haul matter is only another form of undue discrimination and preference, which are provided for by section 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882 (see General Statutes, 1021), which was in force at the time of the adoption of the constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the State should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the State should find indictments.

The precise question raised in this case was before this court in the case of Louisville & Nashville Railroad Co. *vs.* Commonwealth, 21 R., 239. In that case the company had been fined under an indictment found at the request of the railroad commission, and one of the grounds of new trial was that the court had erroneously admitted the order of the railroad commission refusing to exonerate the company to be read to the jury on the trial, and it was insisted that this had prejudiced the defendant on the trial and caused a large fine to be assessed against it. The reading of the order of the commission was clearly prejudicial to the defendant, if improper. This court, however, affirmed the judgment and said:

"There was no error in allowing the order of the railroad commission to be read. This has in effect been determined by this court in the preceding cases."

The matter was not further elaborated at that time because it was considered concluded by the reasoning of the preceding case and the judgment on the former appeal (L. & N. Railroad Co. *vs.* Commonwealth, 20 R., 1380). It was proper to read the order of the railroad commission to the jury only because the statute required a copy of the order to be filed with the grand jury *in order that* the defendant might be indicted. It was the basis of the proceeding without which the prosecution could not be had. Upon a reexamination of the question we adhere to the conclusion then reached.

It is also insisted for the appellee that the statute thus construed is unconstitutional; but section 218 of the Constitution prescribes no penalty. What penalty should be imposed or when was absolutely within the discretion of the legislature. Without section 820, there is no provision of law for imposing a penalty, and if a penalty cannot be imposed under that section on the facts of this case, then there is no provision of law under which the prosecution can be maintained. We do not question the power of the legislature to provide for prosecutions without action by the railroad commission; we only determine that it has not done so by the provision quoted.

Thus construed, the statute does not seem to us in violation of any right secured by the Federal Constitution. The convention in framing the State constitution, if it had seen proper, might have made it unlawful to charge more for the short than for the longer haul under any circumstances. When it did not adopt an absolute rule to this effect, but allowed the carrier to be relieved from the operation of the section, this was more favorable to the carrier than an absolute prohibition would have been. The convention might have vested the power of exoneration in the legislature and authorized it by general laws to regulate the subject. When it created a special tribunal to determine when and under what circumstances the highways of the State might be

so used as to give some shippers preference over others it violated no right of the railroads, for the State in the exercise of its police power had the right to protect the people of the State from extortion and discrimination on the public highways constructed under the power of eminent domain and exercising franchises bestowed by the State. The right of due process of law secured by the Constitution does not extend to matters which at common law were not of judicial cognizance so as to require them to be tried now by the courts (Wulzen *vs.* San Francisco, 101 Cal., 15; 40 Amer. St. Rep., 17; Eames *vs.* Savage, 77 Me., 212; 52 Amer. Rep., 757; Weimer *vs.* Bunberry (Cooley, judge), 30 Mich., 201). The question, what tolls may be charged on a highway, or when or under what circumstances it would be right to charge more for the short than for the longer haul was not at common law of judicial cognizance, and the State has the right in the exercise of its police power to commit the decision of these questions to other branches of the Government than the judiciary. It may create special agencies for the determination of such matters and make their judgments final. Ultimate power must be vested somewhere. It cannot be assumed that the judiciary will be less liable to err than other departments of the Government.

Judgment reversed with directions to dismiss the indictment.

Whole court sitting. Chief Justice Paynter, Judges Guffy and White dissenting.

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JAMES H. McKENNEY,
Clerk

No. 398 143

Br. of Wadsworth & Cochran

for Appellees.

Supreme Court of the United States

OCTOBER TERM, 1900.

Filed Jan. 7, 1901.

CHARLES C. McCHORD et al,
Appellants,

versus

CHESAPEAKE & OHIO RAILWAY COMPANY
and four other cases heard therewith,
Appellees.

Appeal from the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR APPELLEES.

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Supreme Court of the United States

OCTOBER TERM, 1900.

CHARLES C. McCHORD, JAMES F. DEMPSEY and JOHN C. WOOD,

Appellants,

No. 398. *vs.*

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

and four other cases heard therewith.

Appellees.

Appeal from the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

By Section 816 of Kentucky Statutes, it is provided:

"If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of or the right to use in this state, it shall be guilty of extortion."

And by Section 819 thereof, it is provided:

"Any railroad corporation that shall be guilty of extortion . . . shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars, nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars, nor more than five thousand dollars. The Circuit Court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty, as aforesaid, . . . shall have jurisdiction of the offense which shall be prosecuted by indictment . . . upon information filed by the Board of Railroad Commissioners."

These statutory provisions were part of an act of the Legislature of Kentucky entitled, "An Act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a Board of Railroad Commissioners and define its power and duties," which became a law April 6th, 1882, and may be found in Session Acts, 1881, of Kentucky, Vol. 1, p. 66.

They were adjudged to be unconstitutional by the Court of Appeals of Kentucky in an opinion rendered April 4th, 1896, upon an appeal from the judgment of the Marion Circuit Court, assessing a fine upon an indictment found in pursuance to them. It is reported in the case of

Louisville & Nashville R. R. Co. v. *Commonwealth*, 99 Ky., p. 133.

The ground upon which the act was held to be unconstitutional is thus stated by Hazelrigg, J.:

"There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so, as that standard

must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

"If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws."

Subsequent to this decision, thus overthrowing these statutory provisions and evidently as a substitute therefor, the Legislature of Kentucky, at its ever memorable session in the winter of 1900, enacted a law popularly known as the McChord act, which was approved March 10th, 1900, and may be found in Session Acts, 1900, p. 5. It is as follows:

"AN ACT

"To prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the Railroad Commission, in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions.

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this commonwealth, or when said commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be in-

vestigated, and shall hear such statements, argument or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent, or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employe shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars.

"2. The Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employe, shall have jurisdiction in all prosecutions against said officer, agent or employe.

"3. Prosecutions under this act shall be by indictment.

"4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall

be paid by the state, and upon the certificate of the chairman of the commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment."

This act, under Section 55 of the Constitution of Kentucky, became a law on 12th day of June, 1900, which was ninety days after the adjournment of that session of the Legislature.

Pending the consideration of said act in the House an amendment was offered to Section 3 thereof, adding after the words "prosecution under this act shall be by indictment" the words "upon information filed before the grand jury by the Railroad Commission, or any member thereof, and the defendant shall be permitted, upon trial, to introduce proof to rebut the presumption of guilt raised by a violation of any order of the commission fixing a rate, toll or compensation," and it was rejected (see House Journal, 1900, p. 533).

This suit was instituted in the Circuit Court for the District of Kentucky on the 5th day of July, 1900, by the Chesapeake & Ohio Railway Company, as complainant, vs Charles C. McChord, James F. Dempsey and John C. Wood, who then constituted the Board of Railroad Commissioners for the state of Kentucky, as defendants, and the relief sought was an injunction against said defendants enjoining and restraining them from taking any action under the provisions of said act on the ground that it was unconstitutional and void. To the bill of complaint said defendants filed a demurrer, which was overruled, and, defendants declining to answer, a decree was rendered granting the relief sought, from which this appeal is taken.

The sole question which it presents for consideration and determination is as to whether said McChord act is one of the laws of the state of Kentucky. Our contention is that it is not.

BRIEF OF THE ARGUMENT.

Our argument is made up of three distinct propositions, which we will state in logical order and each of which we will endeavor to maintain.

I.

A legislative act which prescribes a penalty against a common carrier for charging and collecting a rate for the transportation of a passenger or of freight in excess of a maximum rate fixed by it, or fixed by an administrative board under its authority, and which does not permit the common carrier in a proceeding to enforce the penalty to question the justice and reasonableness of the rate fixed, is unconstitutional.

This proposition is itself a conclusion drawn from several subordinate propositions.

1st. A Legislature has no unlimited power to fix such rates, nor has it power to confer unlimited power on an administrative board to fix them.

It is well settled that a Legislature has power to fix such rates and that it has power to confer power on an administrative board to fix them. When fixed by the Legislature, it is said to be done in the exercise of a legislative function. When fixed by an administrative board under authority from the legislators, it is said to be done in the exercise of an administrative function.

As said by Mr. Justice Brewer in

Reagan v. *Farmer's Loan & Trust Co.*, 154 U. S., 362:

"There can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad and other carriers and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its Legislature."

The power to fix rates by the Legislature itself in the exercise of a legislative function has been recognized and upheld by this court in the following cases:

Munn v. *Illinois*, 94 U. S., 113.
C. B. & Q. R. R. Co. v. *Cutts*, 94 U. S., 155.
Peck v. *Chicago & Mo. Ry. Co.*, 94 U. S., 164.
Winona, etc., Ry. Co. v. *Blake*, 94 U. S., 179.
Ruggles v. *People of Illinois*, 108 U. S., 536.
Dow v. *Beidelman*, 125 U. S., 680.
Chicago & G. T. R. Co. v. *Wellman*, 143 U. S., 339.
Budd v. *State of New York*, 143 U. S., 517.
St. Louis & S. F. R. Co. v. *Gill*, 156 U. S., 649.
Covington & L. Turnpike Road Co. v. *Sandford*, 164 U. S., 572.
Smyth v. *Ames*, 169 U. S., 466.

The power to fix rates by a commission or other administrative board in the exercise of an administrative function when so authorized by the Legislature has been recognized and upheld by this court in the following cases:

Spring Valley Water Works v. *Schottler*, 110 U. S., 347.
Stone v. *Farmer's Loan & Trust Co.*, 116 U. S., 307.
Georgia R. R. & Banking Co. v. *Smith*, 130 U. S., 174.
Chicago, M. & St. P. R. R. Co. v. *State of Minnesota*, 134 U. S., 418.
Reagan v. *Farmer's Loan & Trust Co.*, 154 U. S., 362.
San Diego v. *National City*, 174 U. S., 740.
Chicago, M. & St. P. R. Co. v. *Tompkins*, 176 U. S., 167.

But the Legislature has not unlimited power in this matter nor can it confer unlimited power upon a commission. Expressions may be found to the contrary in the decisions of this court. In *Munn* v. *Illinois*, Mr. Chief Justice Waite said:

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts."

And again in *Peik* v. *Chicago & N. W. R. Co.*, he said:

"Where property has been clothed with a pubiic interest, the Legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the Legislasure, not the courts, must be appealed to for the change."

And Mr. Justice Bradley, in his dissenting opinion, concurred in by Mr. Justice Gray and Mr. Justice Lamar, in the case of *Chicago, M. & St. P. R. R. Co.* v. *State of Minnesota*, said:

"I repeat, when the Legislature declares that the charges shall be reasonable, or. which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not until then, is it a judicial question. But the Legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

"This is just where I differ from the majority of the court. They say, in effect, if not in terms, that the final tribunal or arbitrament is the judiciary; I say it is the Legislature. I hold that it is a legislative question, not a judicial one, unless the Legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there."

The question was not involved in the Munn and "Granger" cases and hence these expressions were mere *obiter dicta*. As said by Mr. Justice Brewer in *Reagan* v. *Farmer's Loan & Trust Co.*:

"There was in those cases no decision as to the extent of control, but only as to the right of control."

And the expression quoted from the Minnesota case was, as stated, contained in a dissenting opinion. But whatever tendency there may have been in this court or any member of it, at the beginning and in the earlier period of the development of the law on this subject, to go to this extreme length in upholding legislative action, that tend-

ency no longer exists. No one questions now that the power of the Legislature in this particular is a restricted and a limited one. But we regard the truth of this proposition to be so essential to the validity of our argument in this case—being, indeed, the foundation upon which the entire structure is built—that we think it important to make it plain—to drive it home—by copious quotations from the opinions of this court.

We are not concerned with limitations upon this power arising out of a previous contract between the Legislature and a particular corporation by which the right to exercise the power has been granted away in that particular instance, or due to Subdivision 3 of Section 8 of the United States Constitution, conferring power upon Congress to regulate commerce of a certain description. These limitations have always been recognized, and a considerable portion of the litigation in this court on this subject of rates has grown out of the attempt to apply this limitation of previous contract. Indeed, in the case of *Georgia R. R. & Banking Company* v. *Smith*, Mr. Justice Field called attention to the fact that "in almost every case which has been before this court, where the power of the state to regulate the rate of charges . . . has been under consideration the question discussed has not been the original power of the state over the subject, but whether that power had not been . . . surrendered to the company or been in some manner qualified." Since that decision was rendered the discussion has not been so limited, but has taken a much wider range. So far as the limitation imposed by the commerce clause of the Federal Constitution is concerned, it has been but little, if at all, involved in the cases which have arisen in this court.

But the contract limitation has relation to the conditions under which the power in question may be exercised,

and the commerce limitation has relation to the field or territory in which it may be exercised.

What we are concerned with is the limitation, if any, upon the power itself and that in relation to local or intrastate traffic.

That there is a limitation on the power itself within this field was first stated by Mr. Chief Justice Waite, who had made use of the broad expressions above quoted, in the case of *Stone* v. *Farmer's Loan & Trust Co.* He there said:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

According to this, then, the Legislature can not destroy or confiscate—can not require carrying of persons or property without reward—and can not do that which in law amounts to a taking of private property for public use without just compensation or without due process of law. The last limitation is quite indefinite and concerning it Mr. Chief Justice Waite said:

"What would have this effect, we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defense that such tariff so fixed is unjust."

One might infer from this that the learned Chief Justice thought that if a tariff fixed was "unjust" then it amounted to a taking of private property for public use without just compensation or without due process of law. But whether so, or not, it would seem in his view what would amount to such a taking was something less than destruction, con-

fiscation or carrying without reward, inasmuch as it is mentioned as a limitation on the power to regulate in addition to those limitations.

This extract from the opinion of this court in that case was quoted with approval in the cases of *Dow* v. *Beidelman* and *Georgia R. R. & Banking Co.* v. *Smith*, and many subsequent cases. In the former case the contention of the railroad company was that the rate fixed by the Arkansas Legislature questioned therein was "unreasonable." Mr. Justice Gray, who delivered the opinion, pointed out that the court had no means of determining that it was unreasonable "if it would under any circumstances have the power," and continuing said: "Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law."

In the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*, Mr. Justice Blatchford said:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

According to this, the rates fixed or authorized to be fixed by the Legislature must be "reasonable," and if not, the act of fixing them amounts to a taking of property without due process of law and to a deprivation of equal protection of the laws and is invalid.

In the case of *Chicago & G. T. R. Co.* v. *Wellman*, Mr. Justice Brewer said:

"The Legislature has power to fix rates and the extent of judicial interference is protection against unreasonable rates."

In the case of *Budd* v. *State of New York*, Mr. Justice Blatchford, who delivered the opinion of the court in that case and in the Minnesota case, seems to draw a distinction between the power of the Legislature and of a commission acting under authority of the Legislature as to fixing rates and to intimate that whilst the latter could have no power to fix unreasonable rates, the former might have such power. He said:

"In the cases before us the records do not show that the charges fixed by the statutes are unreasonable, or that property has been taken without due process of law, or that there had been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the Legislature was unreasonable."

But he took care to say, in speaking of the power to regulate the charges involved in that case, that such power was not one "to destroy or a power to compel the doing of the services without reward, or to take property for public use without just compensation or without due process of law."

In the case of *Reagan* v. *Farmer's Loan & Trust Co.*, Mr. Justice Brewer states one of the questions involved in that case in these words:

"It appears from the bill that, in pursuance of the powers given to it by this act, the State Commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter

wholly within the power of the legislative department of the government and beyond examination by the courts."

He then proceeds to consider the defendant's contention, and after showing that it was untenable, both on principal and authority, he asks, and proceeds, at length, to consider this question:

"Were the rates, as proscribed by the commission, unjust and unreasonable?"

The result of this consideration is an affirmative answer, and because of it, this court affirmed the judgment below restraining the defendants from enforcing the rates already established.

In the case of *Covington & L. Turnpike Road Company* v. *Sandford*, Mr. Justice Harlan said:

"We have then the case of a corporation invested by its charter with authority to construct and maintain a turnpike road, and to collect tolls 'agreeable' to certain named rates, and which is required by a subsequent legislative enactment to conform to a tariff of rates that is unjust and unreasonable, and which also prevents it, out of its receipts, from maintaining its road in proper condition for public use, or from earning any dividends whatever for stockholders. These facts are admitted by the demurrer. Is such legislation forbidden by the clause of the Constitution of the United States declaring that no state shall deprive any person of property without due process of law? We are of opinion that, taking, as we must do, the allegations of the answer to be true, this question must be answered in the affirmative."

It was therefore held that that subsequent legislative enactment was invalid.

In the case of *Smyth* v. *Ames*, Mr. Justice Harlan said:

"A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as un-

der all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States."

In this case, the justice and reasonableness of the rates prescribed by the Nebraska act involved therein were elaborately considered, and it being held that those rates, without reference to interstate business, were unjust and unreasonable, the act was held invalid.

In the case of *San Diego, etc.*, v. *National City*, Mr. Justice Harlan said:

"That it was competent for the state of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix rates of compensation to be collected for the use of water supplied to any city, county or town, or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the state can not by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law."

And in the case of *Chicago, M. & St. P. R. Co.* v. *Tompkins*, the last deliverance of this court on this subject, Mr. Justice Brewer said:

"It is often said that the Legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts in-

tervene. A single illustration will make this clear: It is within the competency of the Legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if, after determining that certain property shall be taken for public uses, the Legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislalative enactment in respect to rates."

These authorities are sufficient to leave no room for claiming at this late day that the Legislature has unlimited power to fix local rates, or in conferring authority on a commission to fix them. It is practically certain that it will not be claimed that it has such power. The rates fixed must be just and reasonable—or, at least, they must not be "so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just both to the owner and to the public." This limitation on legislative power exists. It is not very definite, and this court has recognized that it is extremely difficult to apply to any specific case. No general rules exist governing its application. As has been said, "each case must depend upon its special facts." But though this is so, the existence of the limitation on the legislative power is as certain as the legislative power itself; and that equally so, whether it acts directly or through a commission. No difference exists in this particular between the two modes of action. In the case of *Reagan* v. *Farmer's Loan & Trust Company*, it was held that the power to fix rates had been exceeded by a commission in that it had fixed unreasonable and unjust rates; and in the cases of *Covington & L. Turn-*

pike Road Company v. *Sandford* and *Smyth* v. *Ames*, it was held that that power had been exceeded in each instance by the Legislature itself in that it had fixed unreasonable and unjust rates.

We are now prepared to take another step forward.

2d. The courts have the power and the right to inquire and determine whether the Legislature or commission, as the case may be, has exceeded its power in the fixing of the rates and fixed rates that are unreasonable and unjust, and, if the result of the inquiry is a determination that the power has been exceeded, to declare the rates so fixed invalid and enjoin their enforcement, and in so doing, they exercise a judicial function.

This proposition follows necessarily from the foregoing proposition. But we are not left to inference. It has been expressly recognized by this court in the opinions in many of the cases referred to above, as shown by some extracts therein already quoted.

Further extracts can be made to the same effect. In the case of *Reagan* v. *Farmer's Loan & Trust Company*, Mr. Justice Brewer said:

"The courts are not authorized to revise or change the body of rates imposed by a Legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they donot engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

And again:

"These cases all support the proposition that while it is not the province of the courts to enter upon the merelr administrative duty of framing a tariff of rates for cayriage, it is within the scope of judicial power and a part

of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all the owners of other property."

In the case of *St. Louis & S. F. R. Co.* v. *Gill*, Mr. Justice Shiras said:

"This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

In the case of *Smyth* v. *Ames*, Mr. Justice Harlan said:

"While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, can not be so conclusively determined by the Legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

In the case of *San Diego L. & T. Co.* v. *National City*, Mr. Justice Harlan said:

"In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the Legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States a judicial question arises, and the courts, Federal

and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law."

In the case of *Chicago, M. & St. P. R. Co.* v. *Tompkins*, Mr. Justice Brewer said:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws, and not of men."

And again:

"When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

As to the exercise of this power by the judiciary Mr. Justice Brewer in the case of *Reagan* v. *Farmers' Loan & Trust Company*, says:

"There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other party of any rights of person or property. In every Constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of an-

other, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

As to what sort of a case is necessary to be made out in order to justify the courts in overthrowing the rates fixed, Mr. Justice Harlan, in the case of *San Diego L. & T. Co.* v. *National City*, said:

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

And Mr. Justice Brewer, in the case of *Chicago, M. & St. P. R. Co.* v. *Tompkins*, said:

"In approaching the consideration of a case of this kind we start with the presumption that the act of the Legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld."

Though in the case of *Reagan* v. *Farmer's Loan & Trust Company*, the same learned Justice seemed to put a rate fixed by the Legislature or a commission on a par with a

rate fixed by a carrier when its rate was being investigated. He there said:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the Legislature, instead of the carrier, prescribes the rates."

It was in the exercise of this power that this court invalidated the rates involved in the three cases of *Reagan* v. *Farmer's Loan & Trust Co.*, *Covington & L. Turnpike Company* v. *Sandford* and *Smyth* v. *Ames*.

This power and right in the judiciary which is an absolute power and right, without condition or limitation, being conceded and established, we are prepared to make another advance.

3d. The Legislature, having a limited power over the subject of rates, and the judiciary, having an absolute power and right to determine whether rates fixed by the Legislature, or under its authority, are unreasonable and unjust, the Legislature can not take away this power and right or curtail it in any respect. This proposition is really not an advance upon the preceding propositions, as it is involved in them. It is though an advance on the form of statement and has the advantage of bringing to the light and stating expressly that which is involved in what has gone before. By no sort of device or provision of law can the Legislature take away or curtail, in any respect, this power and right. For if it can, its power is absolute and not limited, and the power and right of the judiciary is not absolute to the ex-

tent stated, neither of which propositions is true, as we have seen. The Legislature can not expressly provide that the judiciary can not consider and determine whether rates fixed by it or under its authority are unreasonable and unjust. It can not provide that rates fixed by it or authorized to be fixed by it shall be final and conclusive upon the judiciary. It can not provide a specific remedy for the enforcement by the judiciary of the rates so fixed, and require the judiciary to enforce them, irrespective of their reasonableness and justice. If it does provide a remedy for their enforcement by the judiciary, it must leave room, in the proceeding so authorized, for the latter to consider their reasonableness and justice, and if it determines that they are unreasonable and unjust to refuse to enforce them, in that proceeding, and thus render the proceeding unavailing, as a method of enforcing the rates in question. It is not sufficient that the rates may be overthrown in other proceedings instituted by the party affected. The right to overthrow them must exist in the very proceeding in which they are sought to be enforced. Otherwise, the power of the judiciary is limited and curtailed, which, as we have seen, can not be. It seems to us that it is not possible to pick any flaw in this argument and it is not without support in the decisions of this court. In the case of *Smyth* v. *Ames*, Mr. Justice Harlan, most vigorously, said:

"But, despite the difficulties that confessedly attend the proper solution of such questions, the court can not shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the Legislature of the state has declared such to be the case, for that would make the state Legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any state to

the contrary notwithstanding. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given to the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

And the point was distinctly in issue and disposed of in the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*. The Minnesota act of 1887 authorized a commission to fix rates and to institute proceedings in the Supreme Court of the state in mandamus, against the party affected by them, to put them in force. It did not permit that party to question the reasonableness and justice of the rates fixed in the mandamus proceeding. On the contrary, it was the intention of the Legislature that such party should not have a right to raise such question therein, but that the rates fixed by the commission should be final and conclusive, and that all the Supreme Court should have to do in the matter was to compel obedience to them. Some tenderfootedness has been shown in subsequent decisions of this court in accepting such to be the true construction of the act in question in that case, and there is room to suspect a disposition to blame the Supreme Court of Minnesota for that construction, by calling attention to the fact that this court was not responsible for it. As for example, in the case of *San Diego L. & T. Co.* v. *National City*, Mr. Justice Harlan said:

"Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the Supreme Court of that state."

But why was not that the true construction of the statute? We submit that it was and that it is impossible to get away from the reasoning of the court so holding. It was the province of that court to construe that statute and its construction was the true intent and meaning of the statute, so far as this court was concerned, and that was an end of the matter. This, however, by the wayside. Such being the true intent and meaning of the statute, it was held unconstitutional. Mr. Justice Blatchford said:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes there-

for, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, can not be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

There is no gainsaying the correctness of this statement of the law. In the subsequent case of *Budd* v. *State of New York*, Mr. Justice Blatchford showed a disposition to limit it to a case where the rates were fixed by a commission and to hold that it had no application to a case where they had been fixed by the Legislature itself. He said, for example:

"What was said in the opinion in 134 U. S., as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed by the Legislature."

This attempt at a distinction between the two classes of cases is to be traced to the lingering influence of the broad statements in the Munn and "Granger" cases, and Mr. Justice Bradley's dissenting opinion in the Minnesota case, as to the absolute power of the Legislature in fixing rates. It has no more absolute power to fix rates than it has power to confer absolute power on a commission. And the judiciary has absolute power to consider the reasonableness and justice of rates fixed by the Legislature, as much as it has such power as to rates fixed by a commission. The cases of *Covington & L. Turnpike Road Company* v. *Sandford*, and *Smyth* v. *Ames*, following in the track of *Reagan* v. *Farmer's Loan & Trust Company*, settle this. There is no such distinction, we submit, between the two classes of cases.

4th. The Legislature being powerless to take away this power and right of the judiciary to inquire into and determine the reasonableness and justice of the rates fixed, it can not be claimed that they are final and conclusive on the judiciary for any portion of time after being so fixed.

As, for example, they can not be claimed to be final and conclusive until the common carrier affected by them has filed a bill in chancery in a proper forum to have them adjudged invalid, much less until they have been so adjudged. No doubt exists as to the right of the common carrier to institute such proceedings, but the penalty of not instituting them is not submission to the rates and to any attempt to enforce them against it. If such attempt is made, it has the right in the proceedings, in which the attempt to enforce them is made, to question their validity and to ask the court, as appealed to, to adjudge them invalid if the facts so warrant. To hold otherwise is to deny absolute power and right in the judiciary to consider and determine the reasonableness and justice of rates fixed and to concede that the Legislature can, to some extent, curtail it. Hence, we submit that Mr. Justice Miller was in error in his dissenting opinion in the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*, when he said:

"That the proper, if not the only mode of judicial relief against the tariff of rates established by the Legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

He, at once, conceded away his suggestion that a bill in chancery might be the only mode of judicial relief against a tariff of rates by holding that in the mandamus proceedings involved in that case the court had "the same right and duty to inquire into the reasonableness of the tariff of

rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery." He so held because such a proceeding was "equivalent" to a bill in chancery. But, the real ground for so holding is the absolute power of the judiciary to so inquire without interference on the part of the Legislature, in any way, or to any extent. This ground demands also that the common carrier should have the right to raise a contest in the courts as to the reasonableness of the rates fixed in any proceeding of any character or description in which the aid of the court is sought to enforce them to any extent; at least, in any proceedings which the Legislature provides by statute for their enforcement. Hence, also, we submit that Mr. Justice Shiras' qualification of Mr. Justice Miller's position in the case of *St. Louis & S. F. R. Co.* v. *Gill*, is equally untenable. He there said:

"Sometimes in acting on this subject the state legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed—that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected.

"But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

He thus denies the application of Mr. Justice Miller's position to a case of rates fixed directly by the Legislature because of a supposed lack of opportunity to raise the

question of their reasonableness, in such a case, by bill in equity. But suppose the Legislature not only fixes rates and prescribes penalties, but provides that the penalties prescribed shall be adjudged against the common carrier only in proceedings instituted by a commission. Is there not an opportunity in such a case to raise the question by bill in equity, and, if so, would, or not, Mr. Justice Miller's position apply thereto? The truth is, that it is not lack of opportunity to raise the question of their reasonableness by bill in equity where the rates have been fixed by the Legislature itself, which is the real ground why, in such a case, the common carrier has a right to raise the question by way of defense to a statutory or other proceeding to enforce them, and is not bound to resort to such a bill. It is because of the absolute power of the judiciary to inquire into and determine that question whenever its aid is invoked in this way. Why should the fact that the question can be raised by bill in chancery filed by the common carrier, where opportunity exists to do so, deprive the common carrier, in proceedings statutory or otherwise, instituted against it to enforce the rates, to raise the question by way of defense to such proceedings. Mr. Justice Miller concedes that that fact does not deprive it of the right to raise that question in that way in mandamus proceedings. Then why should it have the effect of depriving it of such right in any other duly authorized proceeding brought to enforce them? It must be either because the Legislature has some control over the judiciary in this particular or because the judiciary has power to decline to exercise some part of its jurisdiction when properly called on to do so, neither of which alternatives, we submit, is true.

This leads us to direct attention to the phraseology in which the right of a common carrier as to rates fixed by the Legislature or by a commission under its authority should be stated. Unless correctly stated, it is liable to be the

source of confusion and error what its real right is. It is frequently stated that it is a right to a judicial hearing as to the reasonableness of the rates so fixed. It is certainly that, but if that is all it is, then an opening is left for falling into the position of Mr. Justice Miller, as qualified by Mr. Justice Shiras—that where the common carrier has an opportunity to file a bill in chancery raising the question as to the reasonableness of the rates so fixed, it can not raise it by way of defense in proceedings instituted against it to enforce those rates, except in mandamus proceedings; for in that way it can get a judicial hearing. But that way of stating its right is too indefinite. It is a right to a judicial hearing not only in a court of chancery, where, having an equity, it can, on its own motion, bring the matter, but in any court where those rates are sought to be enforced against it, whether it has brought a suit in chancery or not.

This, we submit, necessarily grows out of the correctness of the positions which we have heretofore advanced and attempted to maintain.

5th. The power of the Legislature on subject of rates being limited to the extent stated and the judiciary having absolute power to inquire and determine whether the limit has been exceeded, it follows that the Legislature can not take it away or curtail it by any investigation which it may make into the matter of rates, or require to be made by a commission before it can exercise authority conferred on it to fix them. It may give the common carrier affected the fullest hearing possible before it, or its committees, before fixing the rates itself, or it may provide for such a hearing before a commission before that body is empowered to fix rates, but it can not make such a hearing before it or its committees or before the commission a basis of denying to the judiciary the power to investigate the matter for itself, otherwise it has not the absolute power claimed for it. It may be that if it provides for the fixing of rates by

a commission, it should also provide for notice of its sessions, at which the rates are to be fixed, and for a hearing by the common carriers affected. Mr. Justice Blatchford seems to intimate this in *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*. He said:

"No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and, although in the present case, it appears that, prior to the decision of the commission, the company appeared before it, by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at."

But we are not concerned with maintaining the correctness of this position. The point we are urging is, that a hearing before any other body or organization, no matter how full and ample, is not and can not be made a substitute for the judicial investigation and hearing which the common carrier is entitled to. There is nothing in the case of *San Diego L. & T. Co.* v. *National City* to the contrary of this. A part of the town company's contention in that case is thus stated by Mr. Justice Harlan:

"It is said that the State Constitution and laws authorized rates to be established without previous notice to the corporation or person immediately interested in the matter, and without hearing in any form, and therefore were repugnant to the clause of the Federal Constitution declaring that no state shall deprive any person of property without due process of law."

In other words, the want of hearing complained of therein was a hearing before the body empowered by the California laws to fix rates, and no doubt the statement quoted from Mr. Justice Blatchford's opinion in the Minnesota case was relied on in support of the complaint. It was

this contention that Mr. Justice Harlan combatted in a portion of his opinion in that case, and which he held to be untenable. It was not a question in that case whether, because of the hearing which it was held was provided for before that body, in those laws, the town company did not have a right to be heard again in the courts as to the reasonableness of the rates fixed. On the contrary, another contention of the town company, in that case, was that the rates fixed were unreasonable, and this court considered and disposed of that contention also, and there was no intimation, from any quarter, that it did not have the right to do so.

A direct authority in support of the position, we are now endeavoring to maintain, is the recent case of

Western Union Tel. Co. v. *Myatt*, 98 Fed., 335.

The act of January 3d, 1899, passed by the Kansas Legislature, created a body which it termed a court of visitation, and gave it power to regulate the business of railroad and telegraph lines within that state, and, amongst other things, to prescribe schedules of rates and to determine the reasonableness of such rates in proceedings had before it upon due notice and opportunity to be heard, and heavy penalties were provided for charging rates in excess of rates adjudged by it to be reasonable.

It was held in that case that the body created by it, though termed a court, was a legislative and administrative body, and that the right of the judiciary to consider and determine the reasonableness of the rates fixed could not be ousted in this way.

Hook, District Judge, said:

"I am, therefore, of the opinion that a proceeding before the court of visitation, in which it is sought to secure a judgment upon the reasonableness of a body of rates prescribed by it to be charged by a railroad or telegraph company, would not be due process of law within the meaning of the Federal Constitution."

This conclusion is a deduction from this admirable and concise statement of the law on the subject of rates made by him in a former part of his opinion:

"Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing and prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our jurisprudence (*Reagan* v. *Trust Co.*, 154 U. S., 362; 14 Sup. Ct., 1047; 38 L. Ed., 1014; *Smyth* v. *Ames*, 169 U. S., 466; 18 Sup. Ct., 418; 42 L. Ed., 819). It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or *quasi* public service, because that is a legislative prerogative, and that the Legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law—to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different."

The result of the whole matter then is that in any proceedings in court against a common carrier to enforce rates fixed by the Legislature or a commission, the common carrier has the right to have that court, in that proceeding, to consider and determine whether the rates, so fixed, are unreasonable and unjust, and if it so determines to refuse to enforce them, and that its right so to do is not at all affected by the fact that it has a right and an opportunity to bring the matter into chancery on its own motion by bill in equity or by the further fact that the rates have been fixed after the fullest investigation and opportunity to be heard by the Legislature or commission, as the case may be. And as stated by Mr. Justice Brewer in the Texas case, there is nothing "new or strange" in this.

6th. If, then, the Legislature, by an act duly passed, fixes rates or authorizes a commission to fix them, and provides further that the common carrier shall be subject to a penalty if it charges rates in excess of those so fixed, and does not permit the common carrier, in the proceeding, to recover the penalty to raise the question as to the reasonableness of the rates fixed, *i. e.*, expressly provides that that question shall not be raised therein, or omits to so provide, intending that it shall not be raised therein, but that the penalty shall be affixed and the rates thus enforced irrespective of that question, the Legislature has denied the common carrier its right and exceeded its constitutional power.

It is not up now whether, in any particular instance, the Legislature has so acted. That question will arise further on. It is well to dispose of one thing at a time. The position now taken is that, if the Legislature has so acted, its action is unconstitutional. This is the proposition advanced in the beginning, and which we have undertaken to maintain. We submit that it is the necessary conclusion to be drawn from what has been heretofore said. It has not been directly laid down in any of the cases on the subject of rates decided by this court, but it is a necessary deduction from them. The question as to the validity of the proposition, has been hinted at, in some of them, but a decision of it has been expressly waived as not necessary to the proper disposition of those cases.

As, for example, in the case of *Spring Valley Water Works* v. *Schlotter*, arising under the California Constitution and statutes, with reference to water rates, the same considered in the late case of *San Diego L. & T. Co.* v. *National City*, Mr. Chief Justice Waite said:

"The question before us is not as to penalties to be inflicted on the company for a failure to sell at the prices fixed, but as to the power to fix the price."

And in the case of *Reagan* v. *Farmer's Loan & Trust Company*, involving the Texas statute, Mr. Justice Brewer states, as amongst the objections urged against it, the following:

"Specific objections are made to the act on the ground that, by Section 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that by Section 14 excessive penalties are imposed upon railroad corporations for any violation of the provisions of the act; and thus, as claimed, there is not only a limitation but a practical denial to railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that the railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, can not be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable and oppressive regulations may be prescribed by the commission."

Concerning these objections, he had this to say:

"We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged—that which establishes the commission and empowers it to

make reasonable rates and regulations for the control of railroads. It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the Legislature would not have enacted that which is within, independently of that beyond its power. Applying this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislation. This is fully accomplished whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simply *prima facie* evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the Legislature would not have established the commission and given it power over railroads without these independent matters. In other words, it is not to be presumed that the Legislature was legislating for the mere sake of imposing penalties, but the penalties and the provision, as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the Legislature in its enactment. Take a similar body of legislation—a tax law. There may be incorporated under such a law a provision giving conclusive effect to tax deeds and also a provision as to the penalties incurred by non-payment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the state depended for its validity upon the penalties for non-payment of taxes or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that the two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration."

But it does seem to us that the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota* decides the question squarely, though it does not come up in that case in the exact form in which it does in the supposed case under consideration. The Minnesota statute required the Supreme Court of that state to compel the common carriers affected to charge the rates fixed by the commission created by it by writ of mandamus. In the supposed case under consideration the legislative act requires the court given jurisdiction of the matter to assess a fine against the common carrier charging rates in excess of those fixed by it or by its commission, thus indirectly compelling submission thereto and compliance therewith. The only difference between the two cases is in the form of the compulsion. In the one, it is direct; in the other, indirect. If the intention of the Legislature in the one case that the common carrier should not be permitted to question the reasonableness of the rates fixed in the mandamus proceeding invalidating that act, a like intention in the other case, as to the penal proceeding, should invalidate the latter act.

It may be claimed, however, that the cases of *Dow* v. *Beidelman* and *St. Louis & S. F. R. Co.* v. *Gill*, arising under the Arkansas statute, and *Budd* v. *State of New York*, arising under the New York statute, are direct authorities against our contention. Each statute was a case of rates fixed by the Legislature itself—the Arkansas statute relating to passenger rates and the New York statute to elevator charges. In the one case the passenger affected was authorized to recover a penalty for an overcharge, and in the other provision was made for assessing a fine in criminal proceedings for the overcharge. The two Arkansas cases were appeals from judgments adjudging the statutory penalty in favor of the passengers, who sued therein, and the New York case was an appeal from a judgment assessing the statutory fine in favor of the state. In each case this

court affirmed the judgment appealed from. It appears that the New York statute contained no express provision permitting the reasonableness of the rate fixed to be questioned in the criminal proceeding to recover the fine. Whether the Arkansas statute was similar to the New York statute in this respect we are not in a position to say, as its provisions are not before us.

Concerning these decisions we have this to say: In the first place they were rendered at a time when this court, or at least certain members of it, seem to have been impressed with the idea that there was a distinction between a case of rates fixed by the Legislature and a case of rates fixed by a commission under authority of the Legislature, as to the power of the courts to inquire into the reasonableness of the rates fixed, with an inclination to hold that that power was less in the former case than in the latter, and the statutes involved in those decisions were both cases where the rates had been fixed by the Legislature itself.

As for example, in the case of *Dow* v. *Beidelman*, Mr. Justice Gray said:

"The court has no means, if it would, under any circumstances, have the power of determining that the rate of three cents a mile, fixed by the Legislature, is unreasonable."

And in the case of *Budd* v. *New York*, Mr. Justice Blatchford said:

"In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if, under any circumstances, we could determine that the maximum rate fixed by the Legislature was unreasonable."

Since then, however, this court has applied the doctrine of the Minnesota and the Texas cases, which were commission cases, to the case of rates fixed by the Legislature in

two distinct decisions, the one being that of *Covington & L. Turnpike* v. *Sandford*, where a Kentucky turnpike statute was invalidated, and the other that of *Smyth* v. *Ames*, where the Nebraska statute, fixing maximum railroad rates, was overthrown, so that there is no longer any room for contention as to there being a difference between the two classes of cases in the matter of the right and duty of the courts to consider the reasonableness of the rates fixed, and if found to be unreasonable, to overthrow them.

But again, in neither of the decisions referred to, was the point made that it was the intention of the Legislature, by the provisions of the act in question, therein, to deny, to the parties affected thereby, the right to question the reasonableness of the rates fixed in the statutory proceeding provided, and that for that reason, the provision prescribing penalties was invalid. The only question discussed was as to the right to fix rates, at all, and as to whether those fixed were reasonable. If that point was necessarily involved and disposed of in those cases adversely to our contention, there is nothing in the opinions of this court to show that it was conscious of it, and at least, the point was not argued and fully presented before this court. It is, therefore, a clear case where the doctrine of *stare decisis* should not apply. A good statement, as to the conditions under which that doctrine does not apply, may be found in the following extract from the opinion of O'Brien, J., in the case of

Rumsey v. *Railroad Company*, 133 N. Y., 79.

He said:

"It is no doubt true that even a single adjudication of this court, upon a question properly before it, is not to be questioned or disregarded except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question. But the doctrine of *stare decisis*, like almost every other legal rule, is not

without exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question. Chancellor Kent, commenting on the rule of *stare decisis*, said that more than one thousand cases could then be pointed out, in the English and American reports, which had been overruled, doubted, or limited. He added that it is probable that the records of many of the courts of this country are replete with hasty, crude decisions, and such cases ought to be examined without fear, and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."

But particularly the unconscious decision in those cases of the point in question adversely to our contention, if there be such a decision in them, should not prevail against us when it is in conflict with the principles laid down by this court in the rate cases, and especially in the Minnesota case, upon full discussion and consideration. The "beauty and harmony" of the law, as a system, requires that they should give way, if they are in the way.

The matter has been decided directly in accordance with our contention in the lower Federal courts. In the case of

Richmond & D. R. Co. v. *Trammel*, 53 Fed., 196,

the Georgia statute involved in *Georgia R. R. & Banking Co.* v. *Smith*, in this court, was under consideration. It was a suit in equity by the complaining railroad company against Georgia Railroad Commission to enjoin them from instituting suits to collect penalties for alleged violations of a certain freight rate established by the commission. The Georgia act conferred power on the commission to fix rates and provided penalties for charging rates in excess of those fixed by it. It further provided that, in suits brought against any railroad corporation, wherein was involved the

charges of such railroad corporation for the transportation of any passenger, freight or car, the schedule of rates established by the commission should "be deemed and taken in all courts in this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for transportation of passengers and freight and cost upon the railroads." The complaining railroad company contended that the portion of the act prescribing penalties was invalid because, by virtue of the provision referred to, it would not have an opportunity in the suits which the railroad commission proposed to institute, to enforce the penalties against it to show that the rates, which had been fixed by it, were unreasonable and unjust, it being claimed that the words "sufficient evidence" meant "conclusive evidence."

Newman, District Judge, thus put one of the questions in the case:

"If the rate is not reasonable and just, will the railroad company have an opportunity to show this before the penalties are enforced against it, under the peculiar provisions of the act of 1879, making the schedule sufficient evidence of its reasonableness?"

He then states that the case mainly relied upon by the complainant was the Minnesota case, and after quoting therefrom, he says:

"The effect of this decision by a majority of the Supreme Court of the United States is that the question of the reasonableness of a rate fixed by a railroad commission is one for judicial determination."

In answer to defendant's contention that that case should be restricted "to the case made by the Minnesota statute and the peculiar facts existing there," he said:

"The principle announced is too clear and the rule laid down is too broad to be thus restricted."

And in answer to the further contention that the de-

cision in *Budd* v. *State of New York* was "a departure from the Minnesota case," and after quoting the language of that decision in relation to that case, he said:

"There is nothing in this language to justify the argument that the Supreme Court intended any departure from the rule announced in the Minnesota case, namely, that where a railroad commission had authority to fix just and reasonable rates, the question of their reasonableness is one for judicial investigation."

And he thus concludes:

"So it seems clear that the rule laid down in the Minnesota case is the proper rule to be applied in this case, and when correctly applied, should control it."

In the application of it, however, he concludes that the words "sufficient evidence" did not necessarily mean "conclusive evidence," and that there was reason for thinking that the Supreme Court of Georgia would hold that it meant "satisfactory evidence," or "*prima facie* evidence." He said:

"The Supreme Court of the United States declares, in the Minnesota case, that it is a constitutional right of a railroad company, when sued for violation of rates of transportation as fixed by a railroad commission, to have a hearing, and offer evidence as to the reasonableness of such rates. The Supreme Court of Georgia says that 'powers of the railroad commission must be exercised within legal and constitutional limitations.' It is evident, therefore, that if any other construction can be given the term 'sufficient evidence' than that it is conclusive evidence, the courts of the state will adopt that construction which will not deprive the complainant, or any other railroad company, of its constitutional rights to a hearing; and this court is not sufficiently convinced that the state courts will be compelled to rule against the railroad companies as to the right to offer evidence to justify it in granting the injunction here prayed for on this assumption. Certainly the courts of the state will, if it can be done, give the term in question a construction consistent with its constitutionality, and which will allow the railroad company a full hearing as to the reasonableness of the rate fixed by the commission."

In the case of

Southern Pac. Co v. *Board of Railroad Com'rs*, 78 Fed., 236,

the provisions of California Constitution in relation to a commission to fix railroad rates and legislation in pursuance thereof was involved. Heavy penalties were provided for as against any railroad corporation charging rates in excess of what might be fixed by the commission and it was expressly provided that "in all controversies, civil or criminal, the rates of fares and freights established by said commission shall be deemed conclusively just and reasonable." It was held that this latter provision was unconstitutional under the authority of the Minnesota case.

The conclusion of the whole matter then is that, if a legislative act prescribing penalties for charging rates in excess of those fixed by the Legislature or commission, as the case may be, does not permit the party affected thereby to question the reasonableness of the rates fixed in the proceedings to enforce the penalties, which it may do either by expressly providing that the rates shall not be questioned, but shall be conclusive therein, or by omitting to expressly provide that they may be questioned therein, the intention on the part of the Legislature being that they shall not be questioned, but inflicted, whether or no, upon proof of guilt of charging the excess rates, the act is invalid. The fact that the party to be affected may enjoin the enforcement of rates after they have been fixed, if they are unjust and unreasonable, by bill in equity, does not prevent its being invalid, nor deprive the party to be affected of the right to enjoin the fixing of rates at all before anything has been done, if it has opportunity to do so, and the power to fix rates goes down with the invalid portion of the act; nor does the fact that the party affected had an opportunity to be heard before the Legislature or commission prevent such portion of the act being invalid,

or deprive it of the right to such injunction under the circumstances stated.

We have considered the matter as if the law where rates are fixed by the Legislature itself was the same as where fixed by a commission, which we consider to be the present condition of the law as laid down by this court. If, however, there is a difference between the two cases in that the judiciary has less power over the rates fixed in the one case than it has in the other, we would direct attention to the fact that this is a case of rates authorized to be fixed by a commission.

But before leaving this branch of our argument, it may be well for us to say something in response to some suggestions of counsel for appellants which may tend to confuse matters, and therefore need clearing away.

In the first place, they state our contention to be that a common carrier is entitled to a judicial hearing, as to rates to be fixed before the rates are fixed, and that we base this doctrine upon the Minnesota case. No such position is advanced herein. Counsel are merely setting up a man of straw, in order that they may readily knock it down again. The contention is that after rates have been fixed by the Legislature or a commission, the common carrier has a right to a judicial hearing as to the reasonableness thereof; and that in the statutory proceeding, if any, which may be provided for the enforcement of the rates so fixed, and if the Legislature attempts, in any way, to deny or to curtail this right, the act is, at least, in so far unconstitutional. And the Minnesota case is relied on in support of this proposition, and none other. Counsel concede that it supports this contention in part, but they have failed to appreciate its full bearing. They say that it lays down the doctrine that the common carrier is entitled to a judicial investigation, and that a law which denies it that right is unconstitutional. But it goes farther, and holds that the

common carrier is entitled to a judicial hearing in the very proceeding authorized to enforce the rates fixed, and that a law which denies it the right to be heard in that proceeding is unconstitutional. There the statute of Minnesota provided that the Supreme Court of the state should compel the common carrier affected by the rates fixed by the commission to charge them, whether or no, and denied them the right to question the reasonableness of the rates fixed in the mandamus proceedings. It is true that such was the construction put upon the statute by the Supreme Court of Minnesota. But it was its province to construe the statute of its own state and its action in regard to the statute in question should be accepted without question or intimation that it may have been wrong. Mr. Justice Miller, in his dissenting opinion, did suggest that the proper remedy for the common carrier was a bill in chancery to enjoin rates fixed, and that until this was done it was not competent "for the corporation with regard to each individual who demands its services to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

Whether he intended thereby to deny the right of the common carrier to raise a contest in the courts over the reasonableness of the rates fixed in any statutory proceeding authorized to enforce them, is not quite certain. He did, however, concede that it had such right in mandamus proceedings provided by statute for their enforcement. And Mr. Justice Shiras intimated a further qualification to the effect that it had the right to raise such a contest in any statutory proceeding provided, if no opportunity exist to raise it by bill in equity. These qualifications, we submit, overthrow the rule itself, and the principles embodied in these rate cases, and especially in decision in that case require that it should be held that in every statutory proceeding provided for the enforcement of rates, the common

carrier should have the right to question their reasonableness, and that a law, denying it the right so to do, would be unconstitutional Any rule would require the common carrier to submit to the rates fixed, if the statutory proceeding were instituted before a bill in chancery was filed, or would compel him to forego setting up the question in one proceeding in order that he might set it up in another.

Nor is it claimed that the Minnesota case holds that it is necessary for the act to expressly provide for a judicial hearing after the rates are fixed in order to be constitutional. It is only claimed that, if it appears from the true interpretation of the act that it was the intention of the Legislature that there should not be such a hearing in the statutory proceeding provided, it is unconstitutional. The absence of such express provision has bearing upon the true interpretation of the act and has no other effect according to our contention.

Point is also made that this court in remanding the case to the Supreme Court of Minnesota left it open for that court to review its opinion that under the statute it could not investigate judicially the reasonableness of the rates fixed by the commission, and required that only in the event it adhered to that opinion should the proceedings for a mandamus be dismissed. We can see nothing in this in the way of any position we have taken, or in support of appellants' contention. On the return of the case to the Supreme Court of Minnesota, it adhered to its former opinion and under the decision of this court, dismissed the mandamus proceedings.

Thereafter, in the year 1891, the year subsequent to the decision of this court, the Minnesota Legislature amended said statute by Chap. 106, Laws, 1891. The amendment provided that:

"Such tariff of rates, fares, charges or classifications, so made by the commission, shall be deemed and taken in all the courts of this state as *prima facie* evidence that the

tariff of rates, fares, charges or classifications, so made, is equal and reasonable."

And further, that parties affected by the action of the commission might take an appeal therefrom to the District Court and thence to the Supreme Court of the state, and in this way, might obtain a judicial disposition of the question, as to the reasonableness of the rates fixed.

This is a practical interpretation by the Minnesota Supreme Court and Minnesota Legislature of the effect of the decision of this court in the Minnesota case. See

Steenerson v. *Great Northern Ry. Co.*, 69 Minn., 353.

It is not necessary to respond in detail to counsel's presentation of authorities from this court to show that a common carrier is not entitled to a judicial hearing, as to reasonableness of rates to be fixed before the rates are in fact fixed, or when they are being fixed, if such a thing were possible, or to show that it is not necessary for a statute fixing rates or authorizing their being fixed, by a commission, to provide expressly for a judicial hearing because we have taken no position contrary to either one of these propositions. It has not come in our way to discuss them. They do not lie in the track of our argument. When we contend that a statute providing a statutory proceeding for enforcing rates must permit a hearing in such a proceeding to be constitutional, we do not mean that it must expressly provide for such hearing therein. What we mean is that the Legislature must not expressly provide that there should be no hearing therein, or it must not omit to provide for it, intending that there shall be no such hearing therein. For the statute is whatever the Legislature intends. The omission of the provision is simply an item bearing on the interpretation of the intention of the Legislature.

II.

The McChord act prescribes heavy penalties to be adjudged against any railroad company or corporation or any officer, agent or employe thereof, for charging and collecting a passenger or freight rate higher or greater than that fixed by the Railroad Commission under the authority of said act, and does not permit such person in the proceeding to enforce those penalties to question the justice and reasonableness of the rates fixed, and, therefore, said act is, in so far, unconstitutional.

The task before us now is to properly construe this act. Is, or not, our contention in regard to its true construction correct?

At the outset let us consider what, if any, effect the fact that the Legislature of Kentucky had no power, as we have shown, to shut out consideration of the question as to the reasonableness of the rates that might be fixed by the Railroad Commission under its authority on the trial of an indictment under the provisions of said act, should have upon the construction thereof. It wont do to say that because the Legislature had no power to do this that it did not in fact attempt to do so. Legislatures do not always pass constitutional statutes. As a matter of fact, it is well known that they often do not do so. The presumption undoubtedly is that the statutes are constitutional, and it must be clearly shown that they are unconstitntional before they will be disregarded. This is a trite saying in constitutional law. It is well put by Mr. Justice Woods in

Presser v. *People of Illinois*, 116 U. S., 252.

He there said:

"But it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and paramount law."

But if it is clear that the Legislature, in any specific instance, intended to provide that which is unconstitution-

al, the courts have no power to shape the statute in question, so as to make it constitutional. It has no other alternative than to overthrow it when properly appealed to for that purpose. Courts can not legislate. They can only interpret or overthrow legislation. This is equally trite. But we are not in search of that which is new. We are after established principles and a proper application of them to the case in hand.

There are but two cases, so far as we have been able to discover, in which constitutional provisions have any bearing in the ascertainment of what is existing statutory law, other than to overthrow them as unconstitutional. One is where a constitutional provision goes into effect after a statute and has the effect of modifying or repealing the statute. Such was the case in

Neal v. *Delaware*, 103 U. S., 370.

The statute of Delaware passed before the Fifteenth Amendment restricted the right of suffrage to white male citizens, and required that jurors should be voters and sober and judicious persons.

Concerning the effect of that amendment on these statutory provisions, Mr. Justice Harlan had this to say:

"Beyond question, the adoption of the Fifteenth Amendment had the effect, in law, to remove from the state Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward the statute, which prescribed the qualifications of jurors, was, itself, enlarged in its operation, so as to embrace all, who by the state Constitution, as modified by the Supreme law of the land, were qualified to vote at a general election."

The other instance referred to arises where the constitutional provision is in existence at the time the statute becomes a law. It is where the statute is silent, as to a constitutional right and contains no provision negativing that right. There the right is considered as recognized by the

statute and as having no harmful effect upon the statute. A good illustration of this may be found in the case of

Cincinnati, N. O. & T. P. R. R. Co. v. *Kentucky*, 115 U. S., 321.

It is well settled law that a tax-payer is entitled to a hearing as to the assessment of his property for taxation. This right is thus well put by Bennett, J., in the case of *Slaughter* v. *City of Louisville*, 89 Ky., 123:

"Taxes are not debts. Debts are obligations founded upon contracts, express or implied. But taxes are impositions levied for the support of the state government, or for county or city purposes. When they are imposed by authority, they operate on the tax-payer *invitum*; when they take the form of a percentum, there must be a valuation as a basis of the power to levy and collect them. The tax-payer is entitled to be heard in fixing this valuation. The basis of the right to collect taxes from him consists in the valuation of his property; and to deny him the right to be heard in making this valuation, would be the taking of his property without due process of law."

Now the Kentucky act of April 3d, 1878, relating to the assessment of railroad property for taxation by the Railroad Commission, though it provided that the assessment should be based upon a report of property and valuation made by the various railroad companies in the state to the State Auditor and by him laid before the Railroad Commission, contained no express provision entitling the railroad companies to be otherwise heard before the commission concerning the assessment of their respective properties. It was claimed by them in the case from the decisions of this court last referred to that it was the intention of the Legislature that they should not have other hearing before the commission, and because of this the act, and assessments made under it, were invalid. But this court held otherwise. Mr. Justice Matthews said:

"These meetings (of Railroad Commission) are public and not secret. The time and place for holding them are

fixed by law. The proceedings of the board are required to be made matter of record, and authenticated by the signature of the quorum present. Any one interested has the right to be present. In reference to this point, the Court of Appeals of Kentucky, in its decisions in those cases, says (81 Ky., 492, 512): 'As we construe this act, although in the nature of an original assessment, the parties had the right to be heard and were in fact heard before the board passing on the question of valuation.'"

And again:

"And if the plaintiffs in error have the constitutional right to such a hearing for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it."

And he quotes from the opinion of Willes, J., in *Cooper* v. *The Wandsworth Board of Works*, 14 C. B. N. S., 180, 194, in a case where a hearing was deemed essential, the following language:

"Although there is no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature."

These, then, are the two instances, and the only two, which our research has brought to our knowledge where, as stated by Mr. Justice Matthews in that case,

"The Constitution and the statute will be construed together as one law."

But this court has also had something to say as to where the two will not be "construed together as one law," and where the statute is in conflict with the Constitution, it will have to give way to the latter. Before going to the construction of the statute in hand, it will be helpful to consider the principles laid down in those cases.

The case of

United States v. *Reese*, 92 U. S., 214,

involved a Federal statute, which provided in general terms for the punishment of inspectors who should wrongfully

refuse to receive the vote of a citizen when presented under certain circumstances, and for the punishment of those who, by unlawful means, hindered or delayed any citizen in doing an act required to be done in order to qualify him to vote or from voting at any election. Congress had a right to provide for the punishment of those who wrongfully refused or hindered a citizen from voting "on account of the race, color or previous condition of servitude of the voter," but not on any other account. The statute in question did not limit its operation to a refusal or hindrance on such account, but was broad enough to cover a refusal or hindrance on any other account. It was held that it could not be made to apply only to those acts which Congress might rightfully punish.

Mr. Chief Justice Waite said:

"The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one."

In the Trade Mark Cases, 100 U. S., 82, there was under consideration a Federal statute, whose purpose "was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries, which extended no such privileges to us, were excluded from them here."

Congress had power to pass a statute regulating trade-marks used in commerce with foreign nations and among the several states, and it was claimed that the statute could be limited by construction to such cases and thus made constitutional. It was held that this could not be done. Mr. Justice Miller said:

"It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished, which are not described in language that brings them within the constitutional power of that body."

And again:

"If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, viz., to make a trade-mark law which is only partial in its application, and which would complicate the rights which parties would hold in some instances under the act of Congress, and, in others, under the state laws."

In the case of

Spraigue v. *Thompson*, 118 U. S., 90,

Section 1512 of the Code of Georgia was involved. It required vessels bearing toward any port of that state, except coasters of such state and between its ports and South Carolina or Florida, to accept the pilot first offering his services. Section 4237 of Revised Statutes of U. S. provided that:

"No regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States."

The exception in the Georgia statute was in conflict with the United States statute. With it out, the Georgia statute would have been valid. It was proposed to make it

stand by striking out the exception. Mr. Justice Matthews responded to this suggestion as follows:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional may be rejected and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation, beyond the legislative intent and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

In the case of *Baldwin* v. *Franks*, 120 U. S., 678, a Federal statute was involved which provided that, if two or more persons, in any state or territory, should conspire for the purpose of depriving any person or class of persons of the equal privileges or immunities under the law, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the law, they should be punished by fine or imprisonment.

Congress had power to pass a statute to punish conspiracies to deprive persons of their rights under the Constitution, laws or treaties of the United States; but this act was broad enough to cover conspiracies to deprive persons of their rights under any state law as well, over which Congress had no power.

It was claimed that the statute could be limited by construction to cases within the power of Congress, and thus upheld. This was denied by this court.

Mr. Chief Justice Waite said:

"It provides in general terms for the punishment of all who conspire for the purpose of depriving any person,

or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens, as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

These are all cases where the right of construing a higher and a lower law together so as to make both stand was asserted and denied because by the plain letter of the latter something was attempted to be provided which was in conflict with the former. It is an application of the familiar principle in the construction of statutes that where "the language is plain, there is no room for the construction."

This principle is recognized by this court in the case of

Ruggles v. *People of Illinois*, 108 U. S., 536.

Mr. Chief Justice Waite there said:

"But Vattel's first general maxim of interpretation is that 'it is not allowable to interpret what has no need of interpretation,' and he continues: 'When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it' (Vattel, Law of Nations, 244). Here the words are plain and interpret themselves."

And again in the case of

Board of Lake Comr's. v. *Rollins*, 130 U. S., 662,

Mr. Justice Lamar said:

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the or-

der of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it (*Newell* v. *People*, 7 N. Y., 97; *Hills* v. *Chicago*, 60 Ill., 86; *Denn* v. *Reid*, 35 U. S., 10 Pet., 524; *Leonard* v. *Wiseman*, 31 Md., 204; *People* v. *Potter*, 47 N. Y., 375; Cooley, Const. Lim., p. 57; Story, Const., 400; *Beardstown* v. *Virginia*, 76 Ill., 34). So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction (*United States* v. *Fisher*, 6 U. S., 2 Cranch, 358, 399; *Doggett* v. *Florida R. Co.*, 99 U. S., 72)."

We are now ready to undertake the construction of the McChord act in the particular put in question by us. Thus far, we have been dealing with the generalities. We have been in the air, as it were. But a firm grasp of general principles is essential to right thinking as well as to correct conduct.

In construing the act, we have no interpretation by the Court of Appeals of Kentucky to aid or to control us. The matter comes before this court at first hand, and it is its duty to put its own construction on that act, in accordance with the general principles stated.

In the first place, what does the language used by the Legislature of Kentucky say, and is it, or not, "plain" as to what it does say? If so, "there is no room for construction." It says that:

"Should said railroad company, or corporation, or any officer, agent, or employe thereof, charge, collect or receive a greater or higher rate, toll, or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided," then in that event,

"Said company or corporation and said officer, agent, or employe, shall each be deemed guilty of extortion."

And further, that,

"Upon conviction," *i. e.*, of charging, collecting, or receiving an excess rate, then in that event,

Such parties "shall be fined."

The language of the statute is absolute. In each case, if the condition stated exists, the result "*shall be*"—"shall be deemed guilty of extortion," if the fact of making such excess charge exists; "shall be fined," if convicted of so doing.

It is not provided that the making and fixing of the rate by the commission shall be *prima facie* evidence of guilt of extortion, as has been so often done in such statutes; nor is it provided "that in all trials of cases brought for a violation of any rate made and fixed by the commission, it may be shown in defense that such rate was unjust and unreasonable," as was the case with the Mississippi statute, construed by this court in *Stone* v. *Farmer's Loan & Trust Co.* On the contrary, the charging, collecting, or receiving an excess rate is itself made equivalent to extortion, *i. e.*, to the exaction of "more than a just and reasonable rate," which is its definition in Section 816, Kentucky Statutes, and in the front part of the McChord act. The party so acting "shall be deemed," *i. e.*, shall be judged guilty of extortion, *i. e.*, of charging, collecting, or receiving more than a just and reasonable rate. And on the trial of the indictment, the sole issue involved is as to whether the defendant is guilty of so doing, and if convicted thereof, it or he is to be fined. Such is the "plain language" of the statute. It means that the making and fixing of the rates by the commission shall be final and conclusive, as to their justice and reasonableness. It is not necessary to use the words "final and conclusive" to express the meaning and intention that they shall be final and conclusive. The English language is not so cramped that other phraseology can not be made use of to convey the idea just as well, and that used by the

Legislature of Kentucky in the McChord act does this. It can not be better described than in the language of the Supreme Court of Minnesota in the case of

State of Minnesota v. *Chicago, M. & St. P. R. Co.* 38 Minn., 281,

construing the Minnesota statute invalidated by this court in the Minnesota case. It said:

"It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the Legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should be not simply advisory nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable, and hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force."

That such is the meaning and intent of the plain language quoted above from the McChord act is enforced by other considerations. It is enforced by contrasting this language with that used in the forefront of the act prescribing the matter to be investigated and determined by the Railroad Commission and its powers—in other words, the scope of its inquiry and action. That matter is whether or not, a railroad company or corporation is "charging, collecting, or receiving extortionate freight or passenger rates," *i. e.*, rates in excess of what is just and reasonable or whether or not, it is "guilty of extortion," *i. e.*, of charging, collecting, or receiving more than a just and reason-

able rate and if it determines in the affirmative, it is empowered to make and fix what it deems to be a "just and reasonable rate," which rate it has power thereafter to revoke or modify. It was held in the Circuit Court and is maintained in another brief filed on behalf of the contending railroad companies on these appeals that the McChord act, by this provision, confers on the Railroad Commission judicial power in that it confers on it power to investigate and determine whether a specific railroad company is in a specific instance charging, collecting, or receiving more that a just or reasonable rate, which is a judicial question; that it confers on said body power to fix rates only as a result of such an investigation and determination and not generally; and that because of this fact, the act is unconstitutional and void. With this view we concur. But it is not within the scope of the argument advanced in this brief to urge it. What we do urge is, that by the plain language of the first part of this act, power is conferred on the Railroad Commission to investigate and determine whether, or not, rates being charged, collected, or received are just and reasonable—to fix rates which they may deem to be just and reasonable, if they determine that those that are being charged, collected, or received are not just and reasonable—and to revoke and modify rates so fixed by it. Thus the scope of inquiry before the commission is unrestricted. Extortion before the Railroad Commission is an entirely different thing from what it is before the court on the trial of the indictment. Before the former, it is charging, collecting, or receiving more than a just and reasonable rate. Before the latter, it is charging, collecting, or receiving a greater or higher rate than that made and fixed by the commission. It is inconceivable that, if the Legislature had intended that on a trial of an indictment found under the provisions of said act, the matter of the justice and reasonableness of the rates fixed by the commission could be investigated or

determined, that it would not have used some language from which such intention could have been inferred, and that it would not have refrained from saying in positive language that, if such excess rates were charged, the party so charging "shall be deemed guilty of extortion," and that, if it was convicted of so charging, it "shall be fined."

The construction we have placed on the "plain language" of that portion of the McChord act put in question by us is still further enforced by a consideration of what brought that act about. Unquestionably, its origin was the decision of the Court of Appeals of Kentucky in the case of

L. & N. R. R. Co. v. *Com.*, 99 Ky., 132,

holding Section 816 of Kentucky Statutes, unconstitutional. As appears from the extract from the opinion in that case quoted by us in the early part of this brief, the ground upon which it was held unconstitutional was that the statute did not fix any "standard" by which the carrier might regulate its conduct. It lays down that, in order that one may be punished criminally, the law should erect a "standard," which may be known in advance. Now, according to the ordinary signification of the term a "standard" is always absolute; as, for instance, a standard of quantity, a standard of value, or a standard of style. It is never variable. That which is only evidence, or which, in a certain contingency, may be set aside, can not be considered a standard. That the Court of Appeals of Kentucky used the word in this absolute sense in its opinion in that case would seem certain in view of the fact that it mainly relies upon two cases decided by the lower Federal courts in support of the doctrine laid down by it, in one of which it was held that the Legislature could not prescribe that the rates fixed by a railroad commission should be *prima facie* evidence of extortion in a criminal proceeding, and in the other of which that question was referred to as one requiring determina-

tion in a proper case, but not involved therein. Those two cases are—

L. & N. R. R. Co. v. *Railroad Com. of Tenn.*, 19 Fed., 679.

Chicago & N. Ry. Co. v. *Dey*, 35 Fed., 866.

In the first case Baxter, J., said:

"But the defendants say that their revisions of tariff rates and suggestions in regard to the methods of conducting business are not obligatory on the railroad corporations; that the statute is advisory and not mandatory in its terms. This is true; upon the face of it, the railroad companies are left to adopt or reject the rates fixed, and ignore the suggestions made by the commissioners. But if they decline to conform to the rates fixed by the commissioners they do so at the peril of subjecting themselves to a multiplicity of suits by the state and by individuals, to be tried by juries interested in the reduction of charges, and upon the anomalous principles declared by the act, which by force of the *prima facie* effect therein given to the ex parte action of the commissioners, reverses the presumption of innocence hitherto accorded to all defendants in criminal or *quasi* criminal proceedings, and casts the burden of exculpation on the accused. That such litigation will follow is not at all problematical; it is certain. The authors of this statute have been careful to place this beyond doubt. It is therein made the imperative duty of the commissioners, in the event any railroad company refuses to adopt the rates to be prescribed by them, to institute and prosecute a suit, as hereinbefore stated, for every overcharge; and the juries called to try them will, by the express command of the statute, be compelled to find against the defendants and assess the penalties imposed, unless defendants establish by affirmative proof that its future net earnings, on the arbitrary basis declared by the act, will not exceed a fair and just return on the value of its property to be assessed for taxation, the jury being the exclusive judges of what a fair and just return is. This much is expressly commanded. But 'injured parties' are left to the exercise of their own discretion whether they will sue or not. Nevertheless, by way of inducement, the *prima facie* effect given by the act to the judgment of the commissioners supplies them with the requisite proof to sustain their actions, and, as an additional encouragement, the act offers ten times the amount

of the damages sustained, and a reasonable attorney's fee, to be paid by the railroad company. No railroad company in the state can successfully cope with the litigation that will inevitably follow a refusal by it to conform to the requirements of the commissioners in the particular mentioned. Through the indefinite terms of the statute, severity and multiplicity of its penalties, the impossibility of determining in advance of the verdict of a jury in the particular case, what is and what is not a violation of its provisions, the power conferred or attempted to be conferred on juries to define the offense and then inflict punishment, coupled with the *ex post facto* effect given to their verdict, involves everything in uncertainty and commits every railroad corporation in the state to the mercy of the commission. By the slow but certain operation of this statute, the commission can, if they want to, gradually take and appropriate all the railroad property in the state to the public use, without that just compensation provided for by the Constitution. In a word, the commission, under the terms of this act, hold, in so far as railroad corporations are concerned, the issue of life and death as in the hollow of their hands."

In the second case, Brewer, J., said:

"Another proposition of complainant is that the provisions making the schedule *prima facie* evidence in all suits is an infringement of the right to trial by jury guaranteed by the Constitution of Iowa, and those provisions of the Iowa and Federal Constitutions to the effect that no person shall be deprived of property without due process of law; the argument being that in trials by jury all questions of fact are to be determined by a jury, and should not be prejudged by the action of any other board or officer; that the state should be compelled to prove that the charge was unreasonable, and not compel the defendant, after this *prima facie* evidence, made by strangers to the litigation, and not from examination of the facts in the particular case, had been received, to prove that the charge was reasonable. In support of this contention the cases of *Plimpton* v. *Somerset*, 33 Vt., 283; *Francis* v. *Baker*, 11 R. I., 103; *State* v. *Beswick*, 13 R. I., 213, are cited. On the other hand, it is contended by the defendants that the Legislature has power to change the rules of evidence, and that that is all that is done by this provision, and that, even in the absence of such express language in the statute, the

fact that the schedule had been established by competent authority as a schedule of reasonable maximum rates would make it *prima facie*, if not conclusive, evidence."

It counts nothing that a Legislature can not provide such a standard, as we have maintained in the former part of this brief. Its power, constitutionally, in this particular was not under consideration in that case, and the court may never have investigated that question, and may not have been enlightened in regard to it. The matter in hand was what it could do constitutionally in creating statutory crimes or offenses, and it held that in order to do so, it must "erect" a "standard." And by this it meant not something that was not a "standard," but was only *prima facie* evidence, or that, in a certain contingency, might be set aside, it being left to a jury to determine whether it should be given conclusive effect or should be set aside. It means something that was absolute, and settled guilt or innocence in every contingency, just like a yard stick, a bushel or a gold dollar settles quantity or value, and is, in the real significance of the word, a standard.

It was in view of this decision and the former statute invalidated by it that the McChord act was passed, and its purpose was to erect a standard as to what was a reasonable and just rate for any service to be rendered by a railroad company or corporation, and that was the determination of the Railroad Commission on the subject. It therefore intended that the action of that body should be final and conclusive, and hence the absence of a provision making the rate so fixed *prima facie* evidence of what was just and reasonable, instead of the provision making the charge of an excess rate equivalent to extortion and subject to punishment absolutely, and the absence of a provision saying that the injustice and unreasonableness of the rate fixed might be relied on as a defense to the indictment, as was provided in the Mississippi statute.

But again, as we have pointed out in our statement of this case in the early part of this brief, pending the consideration of the McChord act in the house, an amendment was offered to Section 3 of the act, a part of which was that "the defendant shall be permitted, upon trial, to introduce proof to rebut the presumption of guilt raised by a violation of any order of the commission fixing a rate, toll or compensation," and it was rejected. This may be but a slight circumstance bearing upon the construction of the act and we only refer to it as such. It shows that everything in relation to our construction of the act tends to bear it out.

What is there to be said against our position in this particular? Counsel for appellant have this to say in their brief herein:

"It is further contended by the complainants that the act of March 10, 1900, in not providing expressly that the reasonableness of the rate fixed may be made the basis of a defense, to any indictment or proceeding had under the statute, virtually provides that the rate fixed shall be conclusive, and shall not be inquired into. As we have before seen, however, such a presumption, rendering the statute unconstitutional, will not be indulged. The statute does not so provide. It was not necessary that the statute should contain any provision on this subject. Its silence leaves the matter open to the full operation, through the judiciary, of all of the constitutional provisions, if the commission, in fixing the rate, should attempt their violation. In the absence of a direct provision that the rate fixed shall be conclusive and binding and not inquired into, the rate itself is *prima facie* evidence of its reasonableness. This much is indulged, out of that respect which one department of the government bears toward a co-ordinate department. If the act in question had, therefore, expressly provided that the rate, when fixed, should be only *prima facie* evidence of its reasonableness, there would be no ground for this contention, on the part of the complainants, yet, as we think, the absence of any statement on the subject has this operation and effect."

We concede that the presumption is, in the absence of a consideration of the question in the light of all the cir-

cumstances, that the act is constitutional and that proper respect towards the Legislature of Kentucky requires that this court should indulge that presumption. Our contention is that this presumption is rebutted, and that it is clear upon such a consideration of the act that it is unconstitutional in the particular claimed, and that therefore so much of the act, at least, must go the way of numberless other statutes that have been so declared.

Counsel assume in this extract from their brief that our position is, that in every case the absence from such a statute of an express provision to the effect that the fixing of the rates in question shall only be *prima facie* evidence of their reasonableness, or to the effect that they may be disregarded if shown to be unjust, "virtually provides that the rate fixed shall be conclusive and shall not be inquired into." Such is not our contention. What we claim is, that this act, providing that the railroad corporation or company charging an excess rate, "shall be deemed guilty of extortion," and that if convicted of so doing, "shall be fined," instead of providing that the fixing of the rates by the commission shall be *prima facie* evidence of guilt of extortion and omitting a provision to the effect that, on the trial of the indictment, the rates may be shown to be unreasonable, means and can mean nothing else than that the rates so fixed "shall be conclusive and shall not be inquired into." The act says in express terms that charging an excess rate is guilt of extortion—not that it is *prima facie* evidence of guilt. It says further that conviction of charging such excess rate shall be followed up by a fine—not that it shall be so followed up unless the fixed rate is shown to be unjust.

And we maintain that our contention, as to the meaning of the words, so used, to be drawn from the words themselves, is enforced by the considerations referred to and that there is not a solitary consideration to the contrary.

This is not a case where the statute and Constitution can be read together. It does not come within either of those two instances, which we have stated, in which they can be read together. It is a case where the plain language of the statute is in conflict with the Constitution, and must, therefore, give way. It can not be made constitutional by changing the language used or narrowing its meaning or by introducing words of limitation, which are not there. To do so, would be "to make a new law, not to enforce an old one"—to make a law which the Legislature of Kentucky did not make—or to make a limitation "by construction, and not by separation," neither of which can be done by this court.

Nor does the absence of a direct provision that "the rates fixed shall be conclusive and binding and not inquired into" have the effect of making "the rate, itself, *prima facie* evidence of its reasonableness."

Much less does the omission from the act of a provision making the fixing of the rates by the commission *prima facie* evidence of their reasonableness or permitting their unreasonableness to be urged as a defense; its silence in this particular, or the absence of any statement on the subject leave "the matter open to the full operation, through the judiciary, of all the constitutional provisions," or have the operation and effect of making the rates fixed only *prima facie* evidence of their reasonableness.

The idea that the rates fixed shall be final and conclusive and not inquired into can be expressed in other language than that direct language itself. It so conveyed, in the act in question, by providing that charging an excess rate does in and of itself amount to extortion, *i. e.*, to charging more than a just and reasonable rate, and that conviction thereof shall be followed by punishment, at least when these provisions are regarded in the light of the considerations referred to.

Undoubtedly, on the trial of an indictment, found under the act, the defendant could urge its unconstitutionality. Perhaps he could waive this matter and urge as his sole defense, the unconstitutionality of the rate, *i. e.*, that it was unjust and unreasonable. If he could do so, it would be by the grace of the court and not by the grace of the Legislature of Kentucky. And the graciousness of the court would not relieve the act of the Legislature of its ungraciousness. The constitutionality of the act is not saved, therefore, by the fact that the defendant would be entitled to avail himself of his constitutional right to attack the reasonableness of the rate fixed on the trial of the indictment. The constitutionality of a statute is not to be determined by what rights a party has, notwithstanding the statute, but by what rights the Legislature intended he should have —otherwise, no statute would be unconstitutional. If the Legislature, by a statute, intended to deny one that which is a constitutional right, the statute is unconstitutional, though the right in fact is unaffected thereby.

For these reasons we submit that the McChord act is unconstitutional in the particular claimed,

III.

So much of the McChord act as prescribes penalties for charging rates in excess of those fixed by the commission being unconstitutional, the rest of the act fails and it is wholly void. It is not a law of the state of Kentucky.

It is well settled that, in order to overthrow an act entirely, it is not sufficient that it is unconstitutional in part. If the act is capable of separation into parts, as the phrase goes, the parts that are constitutional will stand, though another part may be invalid on account of its unconstitutionality.

It is important, then, to know what is the test by which it is to be determined whether a given act is capable of sep-

aration into parts. It is well stated by this court in the Virginia Coupon Cases, 114 U. S., 305. Mr. Justice Matthews there said:

"Where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even if the other part should fail.

"To hold otherwise, would be to substitute for the law intended by the Legislature, one they may never have been willing by itself to enact."

No better statement of the law on the subject can be found, and it is useless to cumber this very lengthy brief with additional citation of authority in support. One illustration of its application by this court will be helpful, however. We refer to the case of

Barron v. *Burnsides*, 121 U. S., 186,

involving a statute of Iowa which provided by its—

"SECTION 1. That any corporation of certain character foreign to that state desiring to transact or to continue to transact business in that state should file with the Secretary of State certain documents, and an application for a permit to do business in the state, containing a stipulation that the permit was subject to each of the provisions of said act, and that, thereupon, the Secretary of State should issue it a permit, and it should have a right to do business in the state.

"SEC. 2. That no such foreign corporation, which had not complied with said provisions, should have the right of eminent domain or exercise any of the rights and privileges conferred upon corporations.

"SEC. 3. That any such foreign corporation, which should remove any suit against it in the state court to the Federal courts should thereupon forfeit its permit and right to do business in said state.

"SEC. 4. That any such foreign corporation that should do business in said state without having complied with said statute should be liable to a penalty of $100 a day for each and every day that it did business in the state, and any agent, officer, or employe, should likewise be liable."

Under this statute an indictment was found against the agent of a railroad corporation, and it was urged in defense that Section 3 was unconstitutional, and that the rest of the act went with it. This defense was upheld. Mr. Justice Blatchford said:

"It is apparent that the entire purpose of this statute is to deprive the foreign corporation, in suits such as those mentioned in Section 3, of the right conferred upon it by the Constitution and laws of the United States, to remove a suit from the state court into the Federal court, either on the ground of diversity of citizenship, or of local prejudice. The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the Secretary of State, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the state, might not be an unreasonable or objectionable requirement, if standing alone, but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit and, with the stipulation referred to, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the Federal court."

Let us apply the law, thus laid down in these cases, to the one in hand. Are, or are not, the parts of the McChord act distinctly separable so that each can stand alone? Is the court able to see and to declare that the intention of the Legislature of Kentucky was that the part of that act conferring power on the Railroad Commission to hear and determine whether a specific corporation, in a specific instance, has charged, collected, or received an extortionate passenger or freight rate, and if it so determines, to make and fix what it may deem a just and reasonable rate, should be enforceable, even if the rest of the statute should fail.

It will be borne in mind, as heretofore stated, that the Circuit Court decided, and it is maintained in another brief filed in these cases, that this part of the act is unconstitutional, also, and for this reason, invalid. We are not con-

sidering that proposition, but assuming, for the sake of the argument, that it is not unconstitutional, does it not go because of the unconstitutionality of the remainder of the statute? We contend that it does and that the question, above put, must be answered in the negative. We doubt whether it will be seriously contended to the contrary. The act consists of five sections. The last part of the first section and the second, third, and fourth sections, all relate to the criminal proceedings provided for enforcing the rates fixed by the commission, and are unconstitutional. The first part of the first section and the fifth section relate to the proceedings before the commission. There is an entire absence of anything tending to show that the Legislature intended that the commission should have this jurisdiction, if the means provided for the enforcement of its action should fail. On the contrary, there is no room for doubt that it had no such intention.

If those three propositions, which we have advanced and undertaken to maintain, are true, then the McChord act is not a law of the state of Kentucky.

Jurisdiction.

Counsel for appellants seem troubled concerning the jurisdiction of the Circuit Court of this cause, and after considering authorities cited as bearing on the question, they reach the conclusion that it did not have jurisdiction. They allege two reasons for their positions, as follows:

"1. That the making of a rate for the government of those in the discharge of a public service is a legislative function, which can be discharged immediately by the Legislature, or more appropriately by it through an administrative board, and that to enjoin the making of a rate is to deny to the state this power of control, which is universally conceded.

"2. Where the administrative board merely makes the rate, but is not charged with the power of enforcing com-

pliance with the rate after it is made, a suit against such a board or its members is a suit against the state."

We will consider each reason in the order stated.

Counsel characterize the act of an administrative board in fixing a rate under authority of the Legislature as the exercise of a legislative function. Elsewhere they characterize it as a quasi-legislative function. There may be some authority for so characterising it. We have characterized it at the outset of this brief as an administrative function. In so doing we were led by this language of Hook, District Judge, in

W. U. Tel. Co. v. *Myatt*, 98 Fed., 335:

"The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered, is wholly a legislative or administrative function."

But there is nothing in a mere name for a thing. It is the thing itself that counts. Assuming, therefore, that when a commission acts in fixing rates, it is in the exercise of a legislative or quasi-legislative function that it does so, one thing is certain, that it, *i. e.*, the commission is not the Legislature itself, or any part of it. It is simply a board, administrative, executive or otherwise, created by an act of the Legislature. It has no inherent power in itself, and has no other power than the Legislature may have conferred upon it and had a right to confer upon it, or that may have been conferred on it by the Constitution of the state where it exists. This is to be borne in mind as we proceed.

It is therefore true, as implied in the first reason stated by counsel, that a legislature can not be enjoined from fixing rates, nor can a commission created by it and authorized to fix rates be enjoined from so doing. A sufficient reason why they can not be enjoined from so doing is, that in each instance power to fix rates exists.

It is true that it is not an absolute power, but a limited one. But in the advance of the rates being fixed, it can not be said that the limit will be exceeded. Indeed, the presumption is, that it will not be. And it may be that in both instances that another reason exists why an injunction will not lie, to-wit: That it is a suit against the state. Certainly so, as to the Legislature, which has inherent power to fix rates.

Counsel is therefore correct in saying that "to enjoin the making of a rate is to deny to the state this power of control," and that this power of control, limited as set forth herein, is "universally conceded." All this, however, falls far short of constituting a good reason against the jurisdiction of the lower court of this cause.

This is not a case where power to fix rates is conceded to the Railroad Commission of Kentucky. It is a case where it is claimed that no such power exists—that the McChord act, under which the power to fix rates is claimed, is not a law of the state of Kentucky, and confers no power on that body, so to act. If we are wrong in this contention, then, undoubtedly, appellee was not entitled to an injunction. But it does not follow that, because on this basis appellee would not have been entitled to an injunction, that it is not entitled to it, if we are right in that contention. This fallacy runs all through the elaborate argument of counsel for appellant, on subject of jurisdiction. They point out, with evident satisfaction, that, with a single exception, to-wit, the case of *Stone* v. *Farmer's Loan & Trust Company*, no lawyer has had the hardihood to seek an injunction against the Legislature, or its commission, to enjoin the making of a rate, but in all the cases, except that one, the suits were brought after the rates were fixed and sought to enjoin their enforcement because unreasonable. This claim is correct. But the fact stated is accounted for by the further fact that, in each instance where the rates

were fixed by the Legislature, it had inherent power to fix them, and, therefore, could not be enjoined; and where they were fixed by a commission, it had authority so to do, and hence, could not be enjoined from fixing them in advance of their being fixed. The singularity of the case of *Stone* v. *Farmer's Loan & Trust Company*, in that this suit was brought to enjoin the Mississippi Commission in advance of their action, is accounted for by the simple fact that there it was claimed that that body had no power to act at all. It was because of this fact that it was claimed on the part of the complainants that it was entitled to an injunction to prevent action by the commission—that the jurisdiction of the court was not disputed—and that it was assumed by everybody connected with the case that, if the claim of complainant, as to the power of the commission, was correct, it was entitled to the injunction sought. It was denied that relief, because it was held that the commission had power to act and it could not be told in advance of action that it would exceed its power.

That case is a direct authority in support of the jurisdiction of the lower court of this cause.

The right of a common carrier is not limited to enjoining the enforcement of a rate which has been fixed on the ground of its unreasonableness—but it extends to enjoining the making of a rate at all if a Railroad Commission is proposing to make rates when it has no power to make them. It has just as much right to prevent the making of a rate at all in such a case as it has to prevent the enforcement of the rate when the commission, having power to make rates, has exceeded its power. The reason why, in the latter instance, an injunction will not lie in advance of rates being fixed, and will lie in the other is, that in the one case, it can not be told in advance whether the action of a commission will be illegal, whereas it can in the other, because it has no right to act at all.

Enjoining a Railroad Commission from making a rate when it has no authority at all to make one, does not deny the state its power of control over rates. An injunction in such a case does not interfere, in any way, with a state's control over rates.

We submit, therefore, that the first reason urged by counsel, against the jurisdiction of the lower court, is not well taken.

The same can be said of the other one. It is admitted that a suit against a Railroad Commission to prevent an enforcement of rates fixed because unreasonable is not a suit against the state. It has been so decided by this court in the cases of

> *Reagan* v. *Farmer's Loan & Trust Company* and *Smyth* v. *Ames.*

Then, why is it that a suit against a Railroad Commission to prevent it from making a rate when it has no authority whatever for so acting, is not a suit against the state? We fail to see any ground for a distinction between the two cases.

The case of

> *Fitts* v. *McGhee*, 172 U. S., 516,

has no bearing on this. There the state officers sought to be enjoined did not base their power to act on the statute claimed to be unconstitutional. Mr. Justice Harlan said:

"In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

The ground of jurisdiction then is, that the appellants are proposing to act under a statute in violation of the

Federal Constitution, and which confers no power whatever upon them. This action, if taken, will result in a multiplicity of prosecutions and suits under the statute. Diverse citizenship exists between the parties to this cause. It is, therefore, a clear case of Federal jurisdiction, and also a clear case of equitable jurisdiction. The equity of complainant's case is thus stated in its bill.

"That the defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroad in the state of Kentucky for the purpose of considering whether, or not, said rates, in their judgment, are unreasonable and extortionate, and of fixing rates to be charged by it, if they so determine, and it is their intention and purpose to hear complaints under said act, and upon such complaints being made, to determine whether the rates complained of are unreasonable and extortionate, and, if they so determine, to fix rates to be charged by it instead of those complained of, and the defendants are giving it out in speeches and interviews that they intend so to proceed, and unless restrained by the order of this court, they will proceed to act under said act, hear and determine complaints thereunder, and fix such rates, as they think your orator should charge, and will thereafter, at leisure, modify the rates so fixed, and if your orator does not observe the rate so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the state of Kentucky for failure to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed, and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time, all your orator's officers and agents and servants, though perfectly innocent of any offense, and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted, and heavily fined, to the great demoralization of the public service, which your orator is bound to render; and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator will be

deprived of its property without due process of law, denied the equal protection of the law, subjected to great and irreparable wrong and injury and to a vast multiplicity of prosecutions in the courts of the state."

We, therefore, respectfully submit that the judgment appealed from should be affirmed.

W. H. WADSWORTH,
A. M. J. COCHRAN,
Attorneys for Appellees.

Supreme Court of the United States.

Nos. 141, &c.—October Term, 1901.

Charles C. McChord, James F. Dempsey, and John C. Wood, Appellants,
141 *vs.*
The Louisville and Nashville Railroad Company.

Charles C. McChord, James F. Dempsey, and John C. Wood, Appellants,
142 *vs.*
The Louisville, Henderson and St. Louis Railway Company.

Charles C. McChord, James F. Dempsey, and John C. Wood, Appellants,
143 *vs.*
The Chesapeake and Ohio Railway Company.

Charles C. McChord, James F. Dempsey, and John C. Wood, Appellants,
144 *vs.*
The Southern Railway Company in Kentucky.

Charles C. McChord, James F. Dempsey, and John C. Wood, Appellants,
145 *vs.*
The Cincinnati, New Orleans and Texas Pacific Railway Company.

Appeals from the Circuit Court of the United States for the District of Kentucky.

[January 6, 1902.]

These are appeals from the final decrees of the Circuit Court of the United States for the District of Kentucky, perpetually enjoining Charles C. McChord and others, railroad commissioners of the State of Kentucky, from doing any of the things required by, or from taking any action whatever against complainants under a certain act of the general assembly of the Commonwealth of Kentucky, approved March 10, 1900, which is entitled and reads as follows:

"An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violations of its provisions.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"SEC. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employé thereof charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars.

"SEC. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

"SEC. 3. Prosecutions under this act shall be by indictment.

"SEC. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"SEC. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

All the bills sought the same relief, and their averments, excepting those in respect of alleged contracts with the State in relation to rates set up in the bills of the Louisville and Nashville Railroad Company and of

the Cincinnati, New Orleans and Texas Pacific Railway Company, were in substance the same.

The act of March 10, 1900, was set out in full; its provisions recapitulated; and complainants' view of the legal effect thereof given. The third paragraph was: "All of your orator's rates charged, collected or received within the State of Kentucky are just and reasonable and have not been sufficient for many years to give it a fair return upon the reasonable value of its investment, notwithstanding it has at all times operated its property with the strictest economy and in the most skillful manner."

It was then averred that it was the duty of the railroad commission to see that the laws relating to all railroads, except street, were faithfully executed, and to exercise a general supervision over the railroads of the State; that its functions were administrative; that it was not established as a court; and that under the State constitution it could not be permitted to exercise judicial powers. That all common carriers were subject only to the requirement that their rates should be just and reasonable, and they were in case of controversy entitled to have the judgment of the courts on that question, but that the act referred to singled out railroad corporations and deprived them of any opportunity to have a judicial determination of the reasonableness of their rates when disputed; substituted the non-judicial determination of the railroad commission; and subjected them to penalties, there being no infliction of penalties provided as to other common carriers. That if defendants be permitted to proceed under the act, each complainant "will be compelled to charge the rates fixed by them without any opportunity for a judicial investigation and determination as to their reasonableness, and it will thus be deprived of the lawful use of its property and in substance and effect of its property itself without due process of law, and will also be denied the equal protection of the laws, in violation of section 1 of article 14 of the amendments to the Constitution of the United States."

It was further averred that the act was in conflict with clause 3 of section 8 of article I of the Constitution of the United States, giving Congress the exclusive power to regulate commerce among the States, and with the acts of Congress in that behalf.

The bills then continued:

"And defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroads in the State of Kentucky for the purpose of considering whether or not they shall be altered and reduced in accordance with the terms of said act, and are giving it out in speeches and interviews that they intend to proceed at once under said act, and unless restrained by the order of this court defendants will proceed at once to hear and determine complaints under said act, although the same is in contravention of the Constitution of the United States in all the particulars hereinabove

set out, and is therefore null and void, and will proceed thereupon to reduce your orator's rates to such as they think your orator should charge, and will thereafter at pleasure modify and still further reduce the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the State of Kentucky for failing to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offense and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted, and heavily fined, to the great demoralization of the public service which your orator is bound to render, and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator's contract rights will be impaired, it will be deprived of its property without due process of law, denied the equal protection of the law, and subjected to great and irreparable wrong and injury and to a vast multiplicity of prosecutions and actions in the courts of said State."

The cases were disposed of on demurrer.

The constitution of the State of Kentucky provided:

"§ 209. Railroad commission — Number — Qualifications — Powers — Election—Term of office—Removal of.—A commission is hereby established, to be known as 'The Railroad Commission,' which shall be composed of three commissioners. During the session of the general assembly which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the governor shall appoint, by and with the advice and consent of the senate, said three commissioners, one from each superior court district as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The commissioners so appointed shall continue in office during the term of the present governor, and until their successors are elected and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the commissioners shall be elected, one in each superior court district, by the qualified voters thereof, at the same time and for the same term as the governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in section one hundred and fifty-two of this constitution. The general assembly may, from time to time, change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the commissioners be all elected by the qualified voters of the State at large. And if so required, one commissioner shall be from each district. No person in the service of any railroad or common carrier company or corporation, or of any firm or association conducting business as a common carrier, or in anywise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the railroad commissioners shall be regulated by law;

and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing railroad commissioners. The general assembly may, for cause, address any of said commissioners out of office by similar proceedings as in the case of judges of the Court of Appeals; and the general assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said commissioners, and to impose proper penalties therefor."

"§ 218. Penalty for charging more for short than long haul—Power of commission.—It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this State, may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers, or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operations of this section."

The following are sections of the General Laws of Kentucky of 1894:

"§ 816. Extortion—what is.—If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion.

"§ 817. Discrimination—what is.—If any corporation engaged in operating a railroad in this State shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

"§ 818. Preference or advantage forbidden—Rules defining same quantity of freight.—It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. . . .

"§ 819. Penalty in damages for extortion, discrimination, preference—Jurisdiction—Duty of commission—Limitation.—Any railroad corpora-

tion that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court, shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the board of railroad commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the railroad commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued.

"§ 820. Long and short haul over same road—Penalty—Jurisdiction of courts—Duty of commission.—If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant, and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted.

"§ 821. Three commissioners—Duties.—There is established a department in the State government to be known as the railroad commission, which shall be composed of three commissioners, one of whom shall act as chairman, and whose duty it shall be to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State. Each of said commissioners is authorized to administer oaths, and two of them shall constitute a quorum."

"§ 826. Freight for foreign points to be examined by commission—Duty of commission.—Said commission shall examine all through freight rates from points out of this State to points into this State; and whenever they find that a through rate charge into or out of this State is excessive or unreasonable, or discriminating in its nature, they shall call the attention of the railroad officials in this State to the fact, and to urge them of the propriety of changing such freight. And when such rates are not changed, it shall be the duty of said commission to present the facts to the Interstate Commerce Commission and appeal to it for relief, and they shall receive upon application the services of the attorney general of this State and into the condition, management, and all other matters concerning the business of railroads in this State, so far as the same pertain to the relation of such railroads to the public, and whether such railroad corporations, their officers and employés, comply with the laws of the State; and whenever it shall come to their knowledge, or they shall have reason to believe, that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporations or persons guilty of such violation.

"§ 827. Examination of officers and employés by commission—Penalty for contempt.—They shall have the power to examine, under oath, any person, or the directors, officers, agents and employés of any railroad corporation doing business in this State, concerning the management of its affairs, and to obtain information pursuant to this law; and shall have power to issue subpoenas for the attendance of witnesses, and to administer oaths; and any person who shall neglect or refuse to obey the process of subpoenas issued by said commission, or who, being in attendance, shall refuse to testify, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished for each offense by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment not less than ten nor more than fifty days, or both, in the discretion of the jury.

"§ 828. Penalty for failing to make required reports or obstructing commission—Jurisdiction of courts.—Each officer, agent or employé failing or refusing to make, under oath, any report required by the commission within the time required, or failing or refusing to answer fully, under oath, if required, any inquiry propounded by the commission, or who shall, in any way, hinder or obstruct the commission in the discharge of its duty, shall be guilty of a misdemeanor, and shall be fined for each offense not less than five hundred nor more than one thousand dollars; and it shall be the duty of the commission to prosecute the person offending; and the Franklin circuit court, or the circuit court of any county through which the railroad runs, the officer, agent or employé of which has violated the provisions of this section, shall have jurisdiction of such prosecution; and it shall be the duty of the Commonwealth's attorney to prosecute all indictments, actions and proceedings under this law.

"§ 829. Complaints against companies—Award of commission—Proceedings upon.—The commission shall hear and determine complaints under sections eight hundred and sixteen, eight hundred and seventeen and eight hundred and eighteen. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all the evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be the same as in other ordinary cases."

Mr. Chief Justice FULLER delivered the opinion of the Court:

By the decrees the Railroad Commission of the Commonwealth of Kentucky was permanently restrained from proceeding under the act of March 10, 1900, which was alleged and held to be unconstitutional.

Conceding that the mere fact that a duly enacted law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, it is contended that ground of equity jurisdiction existed here in the want of adequate remedy by the ordinary processes of law for the threatened consequences of the exercise of the power to fix rates in multiplicity of suits and irreparable injury.

It is insisted that, according to the terms of the act, the order of the Commission fixing the rate, toll or compensation which the railroad companies may charge, is self-executing, and that no duty to enforce it is imposed on the Commission; that the companies are shut up by the act, to the final determination of the Commission that they have charged more than a just and reasonable rate, and that on the trial of indictments for failure to observe the rates made by the Commission, the courts cannot entertain any inquiry as to the reasonableness of the rates so fixed because such inquiry is unwarranted by the statute, and because such an investigation would be illusory and worthless. And that even if the question of constitutionality could be raised in defense, yet that if such order be per-

mitted to be entered of record, and notified as provided, the companies, if they do not comply, will be at once exposed to innumerable prosecutions, and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute is upheld.

However all this may be, we think it is not to be doubted that these bills cannot be maintained if it appear that the Commission is charged with the duty of enforcing the orders it may enter fixing rates. The objection that before this is done, the Commission is required to exercise judicial functions in determining that the companies have charged or received more than a just and reasonable rate, goes to the validity of the act. The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction.

It is true that in *Stone* v. *Farmers' Loan & Trust Company*, 116 U. S. 307, the suit was brought to enjoin the railroad commission of Mississippi from proceeding under the provisions of a certain statute therein mentioned against a railroad company, but the question of jurisdiction does not seem to have been raised. The case was considered on its merits and the bill directed to be dismissed. Mr. Chief Justice Waite, speaking for the court, among other things, said: "As yet the commissioners have done nothing. There is, certainly, much they may do in regulating charges within the State, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

In *New Orleans Waterworks Co.* v. *New Orleans*, 164 U. S. 471, 482, the general rule was stated and applied, and Mr. Justice Harlan, who delivered the opinion of the court, said: "We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the State, it will be time enough for equity to interfere, and, by injunction to prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks."

The rule was also applied by Mr. Justice Field in *Alpers* v. *San Francisco*, 32 Fed. Rep. 503, where complainant sought an injunction to restrain the passage of an ordinance which he alleged would impair the obligation of a contract he had with the city. Mr. Justice Field said: "This no one will question as applied to the power of the legislature of the State. The suggestion of any such jurisdiction of the court over that body would not

be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. . . . The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the State or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

In *Southern Pacific Company* v. *Board of Railroad Commissioners*, 78 Fed. Rep. 236, the law of California provided that the commissioners might "enforce their decisions and correct abuses through the medium of the courts;" and, in substance, that after the rate was made by the commission, a copy of the order should be served on the corporation affected thereby, and that twenty days thereafter the rate should take effect. A bill was filed before the twenty days had expired, and Mr. Justice McKenna, then Circuit Judge, held, that it was the duty of the commissioners to enforce the rate, and that an injunction would lie. The railroad commission had made an order reducing the grain rates of the company eight per cent, and had passed a resolution declaring that its general charges were twenty-five per cent too high, and that "this board proceed at once to adopt a revised schedule of rates in accordance herewith in order that the same may be in force before January 1, 1896." The court enjoined the enforcement of the eight per cent reduction, which had already been made, but declined to restrain the twenty-five per cent reduction, because no decisive action had been taken.

Reading the various sections of the General Statutes of Kentucky, set forth in the statement preceding this opinion, as *in pari materia* with the act of March 10, 1900, which should be done since they are parts of one system, having the same general objects in view, we think it apparent that the duty devolves on the Commission to enforce the rates it may fix under the latter act. By section 816, extortion was defined to be charging more than a just and reasonable rate. Section 817 defined unjust discrimination, and section 818 forbade undue or unreasonable preference.

Section 819 denounced the same penalties on conviction of the offense of extortion, or of unjust discrimination, or of unreasonable preference, and provided for prosecution by indictment, or by action in the name of the Commonwealth, on information filed by the board of railroad commis-

sioners; that the railroad companies should be liable in damages to the party aggrieved; and also that prosecution by indictment should only be had on the recommendation or request of the railroad commission.

By section 829 the Commission was empowered to hear and determine complaints under sections eight hundred and sixteen, eight hundred and seventeen and eight hundred and eighteen, and to enforce their awards in the courts.

The duty was imposed on the Commission to initiate indictments under section 820 for charging greater compensation, in the aggregate, for a shorter than for a longer haul.

Section 821 made it the duty of the Commission to see that the laws relating to railroads should be faithfully executed, and to exercise a general supervision over the railroads of the State.

So that unless the act of March 10, 1900, operated to repeal the provisions of the prior law, by withdrawing from the Commission the duty of enforcing the rates it might fix, it was its duty so to do, and indictments were to be found at its instance.

Section 816 read thus: "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use o any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion."

In *Louisville & Nashville Railroad Co.* v. *Commonwealth*, 99 Ky. 132, this section was considered. The court held that the section could not be enforced as a penal statute for want of certainty, and said:

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation,' cannot be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded.

"The *criminality* of the carriers act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

"That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

The court referred to and quoted from *Railroad* v. *Jones*, 149 Ill. 361, and *Railroad* v. *The People*, 77 Ill. 443, in which it was held under a similar statute that the want of certainty in lack of reference to a standard under its first section was obviated by its eighth section providing for the making by the railroad and warehouse commissioners of schedules of reasonable and maximum rates, which, being done, the Supreme Court of Illinois said, "there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed."

Such being the state of the law, the act of March 10, 1900, was passed. The mischief to be cured in respect of extortion as defined by section 816 was the want of certainty, and the remedy provided was the fixing of the rates by the railroad commission.

In so providing, the act, while repeating many of the provisions of section 819, did, indeed, omit reference to an action by way of information, and to liability in damages, and it also omitted the provision that indictments should be made only on the recommendation or request of the railroad commission, but it does not, therefore, follow that it was the legislative intention, without any expression thereof in terms, to repeal so important a provision.

Was the provision repealed by necessary implication? "We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it (the prior law); for they may be merely affirmative, or cumulative, or auxiliary." Story, J., *Wood* v. *United States*, 16 Pet. 362.

Repeals by implication are not favored, and are only allowed to the extent that repugnancy exists, and in order to give an act not clearly intended as a substitute for an earlier one, the effect of repealing it, the implication of the intention to do so must necessarily flow from the language used, bearing in mind the necessity and occasion of the law. And where it is plain that the new law is in aid of the purposes of the old law, the latter will not be held to be abrogated except so far as there is palpable inconsistency.

We do not think that it was intended to repeal the provision of section 819 requiring indictments to be found only on the recommendation or request of the Commission, and still less that it was intended to circumscribe in this particular the general duty of the Commission to see that the laws relating to railroads should be faithfully executed.

Dealing, as we are, with the statutes of Kentucky, we are gratified to find these views confirmed by the Court of Appeals of that Commonwealth in *Illinois Central Railroad Company* v. *Commonwealth*, decided October 25, 1901, its opinion having been furnished us at the close of the argument, and since reported in 64 S. W. Rep. 975.

In that case the railroad company was indicted under section 820, and fined for charging more for a shorter than a longer haul. The indictment

was returned before the railroad commission had determined whether the company should be exonerated as provided by that section. The judgment was reversed, and Hobson, J., speaking for the court, said:

"In the construction of statutes the cardinal aim of the court is to arrive at the intention of the legislature. The court will presume that the legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the legislature had intended indictments to be found for each offense, regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence defining the offense and providing for its punishment, for by the next section (821) it is made the duty of the Commission 'to see that the laws relating to all railroads, except street, are faithfully executed;' and under this provision it would be the duty of the Commission to see to violations of the preceding section. . . . From the section as a whole it is clear that the legislature had in mind providing for the exoneration of the railroad from its provisions in proper cases and exempting the carrier from criminal liability to this extent. It therefore provided for an investigation by the railroad commission, a determination by it whether it deemed it proper to exonerate the railroad and for the enforcement of its decision by indictment by the grand jury in case the railroad was not exonerated. To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The legislature had no such result in mind, but clearly aimed to secure to the carrier a hearing on this question.

"The long and short haul matter is only another form of undue discrimination and preference, which are provided for by section 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882, (see General Statutes, 1021,) which was in force at the time of the adoption of the constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the State should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the State should find indictments."

The fourth section of the act of the general assembly of Kentucky of April 6, 1882, (Acts 1881, p. 66, c. 790,) entitled "An act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a board of railroad commissioners, and define its powers and duties," set forth in the edition of the Kentucky statutes of 1887, p. 1021, and referred to by the court, provided for the infliction of penalties on railroad companies convicted of extortion or unlawful discrimination, and that the offender should be "prosecuted by indictment or by action in the name of the Commonwealth, upon information filed by the board of railroad commissioners;" and also that the companies should be liable in damages to the parties aggrieved. The act of March 10, 1900, does not appear to have been intended to change the settled legislative policy that indictments should be found on the recommendation of the Commission.

The result of these considerations is that the duty of enforcing its rates rests on the Commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition before the rates are fixed at all. Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record, and we are not called on to dispose of other contentions of grave importance, which were pressed in argument, as if now requiring adjudication.

Decrees reversed and cases remanded to the Circuit Court with a direction to sustain the demurrers and dismiss the bills.

True copy.

Test:

Clerk Supreme Court, U. S.